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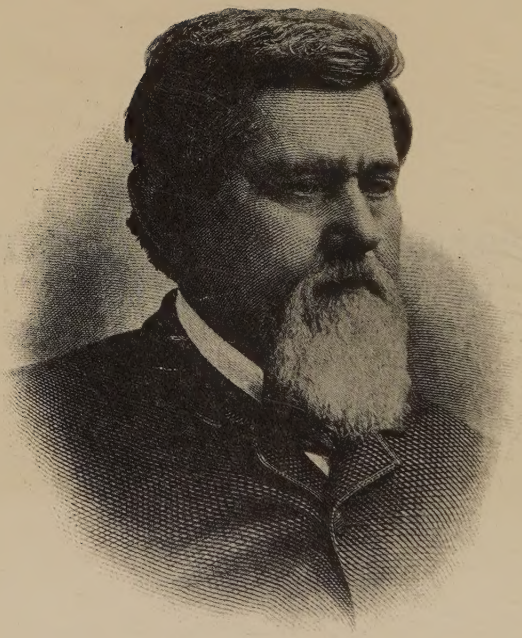
THE POLITICAL HISTORY OF SLAVERY IN THE UNITED STATES



JAMES Z. GEORGE

THE POLITICAL HISTORY OF SLAVERY *in the* UNITED STATES

BOOK I.
THE POLITICAL HISTORY OF SLAVERY IN THE UNITED STATES
BOOK II.
LEGISLATIVE HISTORY OF RECONSTRUCTION

BY

JAMES Z. GEORGE
Formerly Chief Justice of the Supreme Court of Mississippi and later United States Senator from that State

WITH A FOREWORD AND WITH A SKETCH OF THE AUTHOR'S LIFE
BY
WILLIAM HAYNE LEAVELL
American Minister to Guatemala

AND WITH A PREFACE, SOMEWHAT IN THE NATURE OF A PERSONAL TRIBUTE
BY
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FOREWORD

In offering this book to the public I know that it is fragmentary in the sense that the whole purpose the author had in view in writing it has not been achieved, although the parts presented are in themselves complete.

When in the middle of his last term Senator George announced that he would not offer for reelection it was his expectation to devote the leisure to be thus secured to the discussion of the constitutional deficiencies of the reconstruction legislation, especially that part of it which interferes with the unhindered right of the States to regulate the suffrage, add that as the third and last section to the book, and so complete his whole plan. Unhappily he was overtaken by death before the day of his leisure arrived.

After the author realized he would not be permitted to accomplish all he sought when he began writing he doubted the wisdom of publishing any part of the book, but left the decision of that question as well as the preparation of the manuscript for the press in the hands of his friend and successor, the Honorable H. D. Money.

Mr. Money decided to publish so much of the work as was completed, but because of his defective eyesight deferred the matter for some time in the hope that his eyes would improve. However, finding that hope vain, he undertook the necessary labor despite his defective vision, and read the difficult handwriting of Senator George to an operator who made a typewritten copy of the original manuscript.

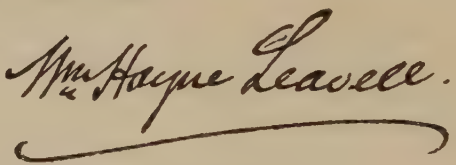
But when he had proceeded thus far Mr. Money realized that, because of his imperfect vision and his own multiplied duties, it was altogether impracticable for him to devote to the task the necessary time and attention; so he reluctantly abandoned the effort and returned the manuscript.

One or two other unsuccessful efforts were made to get the matter prepared for publication, and time passed on.

Finally about two years ago the whole matter was put into my hands. The original manuscript was lost, the text of the copy turned over to me was very imperfect, caused by the manner in which it had been made, numerous references were incorrect, and, having gone through fire and water, the paper itself had rotted.

Now at last the labor is completed and at the end of seventeen years after the author's death his book is issued from the press.

It is sent forth with the hope that the vital question he was able to discuss only in part may awaken the interest its seriousness and importance deserve.



"COTESWORTH," Carrollton, Mississippi.

"Cotesworth"

View from Front Door at "Cotesworth"

SKETCH OF THE AUTHOR'S LIFE

James Z. George was born October 20th, 1826, in Monroe County, Georgia, the son of Joseph Warren George and his wife Mary Chamblis George. In his early infancy he lost his father. His mother having married again, the family moved to Noxubee County, Mississippi, in 1834, remaining in that part of the State some two years only, going thence to Carroll County, where, as boy and man, the subject of this sketch maintained his legal residence until his death sixty-one years later.

He attended the then existing common schools of the South, called "old field" schools, in which was secured whatever of school training he received. According to his bent he took every advantage the schools offered and subsequently augmented his store of knowledge by laborious and persistent study of general literature as well as that of the profession of law which he adopted. He remained a diligent student to the end of his life.

When about twenty years of age he enlisted as a soldier on the breaking out of the Mexican War, was enrolled as a private in the First Regiment of Mississippi Volunteers commanded by Colonel Jefferson Davis, and participated in the battle of Monterey, where he showed that courage and devotion which always characterized him in every field of endeavor. At the time of his death his was one of the three names remaining on the rolls of Congress of all those who had fought in the war with Mexico. He took great pride in drawing his pension of $8 a month, which he handed over every quarter "to a trustee, regularly appointed by the courts in his county for that purpose, to give to the poor widow of a soldier of the Mexican war."

On his return from Mexico he completed his interrupted study of the law and was admitted to the Bar a few months before he became of age, his minority disabilities having been previously removed for another purpose. At the same time

he was married to Miss Elizabeth Young of Carrollton, taking out his license to practise law one week and his license to marry the next.

His young wife's brother-in-law, Judge William Cothran, already well established in the profession, immediately admitted him to partnership and brought him at once into contact with opportunity—in waiting for which so many young lawyers in these days are obliged to eat out their hearts.

In a very short while he was found giving marked evidence of that peculiar adaptability for the law which in no long time made him, if not the most, one of the most effective practitioners in the State. "Whether measured by his successes or by the skill, pertinacity, and power with which he prepared and conducted his causes, great and small, as a practitioner he was unsurpassed."

In 1854 he was elected Reporter of the Supreme Court of Mississippi, then known as the High Court of Errors and Appeals, and was reelected in 1860. In all he published ten volumes of Reports, as well as a Digest of all the Reports of the Decisions of that Court down to 1870. Their completeness and the rapidity with which they were prepared in the midst of other absorbing professional employments constituted in the minds of his brethren of the Bar a most remarkable achievement.

Of these several works General E. C. Walthall, who was more or less closely associated with Senator George during the greater part of the latter half of the nineteenth century, and who served with him in the United States Senate, said: "From the careful and discriminating examination of which these books give evidence on every page, it would be inferred that their preparation was the author's sole employment, when in fact they were issued amid the exactions of a varied and extensive practice, which took him much from home, and when private interests claimed much of his attention. In these reports, as in the digest of all the Mississippi decisions by which he . . . . lightened the labors of the profession, we see the proofs of that capacity for constant and effective labor with which our late associate was as liberally endowed as any man I ever knew. This Digest, though prepared after the close of the war and under the disadvantage incident to four years of interruption in the habits of a student's life, is yet a

model of its kind. In thoroughness and orderly arrangement it is unsurpassed, though the work was done while the courts in which the author was an active practitioner were perplexed with a vast variety of novel and difficult questions arising out of the results of the war and when there were many distracting claims upon his attention."

J. Z. George was a member of the Mississippi Convention of 1861 which passed the Ordinance of Secession and voted for and signed that Instrument. He felt it to be his duty to do what lay in his power to make the ordinance effective and at once enlisted for service in the field. Notwithstanding the fact that the soldier's life did not particularly appeal either to his disposition or taste he never hesitated for a moment whenever he felt that his duty to the State called for his service in field and camp. And while he was never a distinguished soldier his service was marked by the same courage and devotion that characterized him everywhere.

He was captain of a company in the 20th Regiment Mississippi Volunteers; was captured at Fort Donelson and confined seven months as a prisoner on Johnson's Island; after his exchange and release the Governor of Mississippi appointed him Brigadier General of State troops because of the condition of his health; as soon as that was sufficiently restored he raised the 5th Regiment of Mississippi Cavalry and was made its colonel. In his very first battle after his return to the front he was captured again while leading a charge and was once more imprisoned on Johnson's Island.[1] There he was detained for nineteen months, not being released for more than two months after Lee's surrender, and so spent in prison something over half of the whole war period.

During his confinement he occupied his leisure in teaching a class at law, some of whose members subsequently attained prominence in the profession both in Mississippi and in other States.

His lot in prison was rendered less hard by the kindness of his publishers, the Messrs. Johnson & Company, law publishers, of Philadelphia, who advanced him money—paid back after the war—by which means he was able to mitigate the

[1] It is interesting to know that Colonel George's pistol and sword taken from him at the time of his capture have been recently returned after the lapse of nearly fifty years.

privations of some of his less fortunate fellow-prisoners as well as make his own situation more tolerable.

Upon his final release he returned to his home and as early thereafter as was practicable resumed the practice of his profession and was soon on his way to restore his shattered fortunes.

Under a certain friendly pressure from some of his friends among the disheartened planters and in order to help them he began to invest his gains in the rich lands of the Yazoo Delta which, under the rapacity of the Reconstruction Governments, were greatly reduced in value, not being appreciably higher than the taxes remorselessly exacted of the impoverished owners. While others lost heart he felt sure that such a condition of things would not be allowed to continue for any long period of time among a people capable of self-government and accustomed to control the conditions of their own life. His confidence and wise foresight made him most abundant returns in later years.

In the latter part of 1872 he formed a partnership with Honorable Wiley P. Harris of Jackson, then looked upon as the ablest and best equipped lawyer in Mississippi, and moved his residence to the Capital early in 1873.

Of the law firm thus formed General T. C. Catchings, a Member of Congress for many years and himself a lawyer of conspicuous ability, has said: "It is my deliberate judgment that the law firm of Harris & George was as able as any that ever existed in any age or any country. My acquaintance with both of its members was intimate, my observation of their methods and struggles was almost constant, and I unhesitatingly affirm that in my opinion they had both reached the very summit of professional excellence and power."

The year 1875 was for Mississippi "perhaps the darkest period in the era of reconstruction." In the political campaign of that year General George was made chairman of the State committee by a Convention of the Democratic and Conservative people. He won a great victory, and rendered a great service to the country. In that very critical period when the issues involved were vital to the civilization of the South he by his "wise leadership, backed up by strong support," and by using every method political genius could devise, enabled the people to overthrow the fatal combination of negro, carpet-

bagger and scalawag, under whose disastrous maladministration they had suffered so long, and to triumphantly restore to themselves the control of their political existence.

For months the chairman "laid aside his private business and gave all of his time and talents, and freely of his money, to the control and direction" of this ever-memorable campaign. "With a patience that knew no bounds, a discretion that was the marvel of his friends, a diplomacy which was beyond exhaustion, and a courage and grim determination that inspired all who came in contact with him, he organized his forces, and led them to a victory which was beyond any dreamed of by few except himself. The Legislature which assembled in the following January was overwhelmingly Democratic, and immediately set to work to undo the exasperating evils which had been wrought by the alien and hybrid government" which came near ruining the State.

The conduct of the campaign attracted the attention of the entire country, and was subsequently investigated by the Senate of the United States, whose committee, a majority being composed of Senators not averse to finding that corrupt methods had been resorted to in order to overthrow the reconstruction government, after most diligent and not very friendly search failed to find anything on which to base an effort to overturn the result.

When the Legislature came to elect a United States Senator, General George was put forward and very strongly supported by a most formidable following, who felt that the forceful man whose wise leadership had made it possible to elect a Democratic Senator should have the honor bestowed upon himself. But because of the peculiar situation which existed at the time it was deemed more prudent to send another distinguished Democrat to the Senate, and, after consultation, both General George and his friends concluded not to press his candidacy any further. His name was withdrawn from the consideration of the caucus before the first vote was taken.

In 1879 he was appointed by Governor John M. Stone to be Judge of the Supreme Court for a term of nine years and "his associates conferred on him a rare distinction by choosing him Chief Justice immediately on his accession to the bench." He remained in that position something less than two years, but "left his impress upon the judicial annals of the

State in important opinions marked by his characteristic thoroughness, lucidity, and thought."

In 1880 the Legislature of the State elected Judge George to the United States Senate for the term beginning March 4, 1881. Resigning from the bench in February, 1881, and taking his seat in the Senate on March 4th, he began that distinguished Senatorial career which ended only with his life, more than sixteen years later.

"Senator George . . . . was heard upon every important question which attracted the attention of the country while he was a member of the Senate." No important question was "discussed in the Senate from the day of his admission into it that did not receive the benefit of his thought, experience and argument." It is not my purpose to follow in detail the services he rendered the Nation and the State during the sixteen years he sat in the Senate as a Senator from Mississippi. Only a few of those most conspicuous and valuable will be named.

He was the only Democrat among the five Senators who beat the Sherman Anti-Trust Law into the final shape in which it was passed by both Houses on June 20, 1890.

However, it should be added that Senator George was the author of the following provision which Senator Sherman offered in the Senate on March 25, 1890, to be incorporated in the first section:

"*Provided,* That this act shall not be construed to apply to any arrangements, agreements, or combinations between laborers made with the view of lessening the number of hours of labor or of increasing their wages, nor to any arrangements, agreements, or combinations among persons engaged in horticulture or agriculture made with the view of enhancing the price of agricultural or horticultural products."

This was adopted in Committee of the Whole, but the Senate did not accept it and so it failed to become a part of the Anti-Trust Law.

Twenty-three years later this provision in its spirit and purpose was incorporated in the Sundry Civil Appropriation Bill of 1913, and was approved by President Wilson.

If not a more valuable yet a more conspicuous service rendered by him was the "Report of the Minority of the Judiciary Committee of the United States Senate on the Constitutional

Questions Involved in the Bill to Provide for Inquests under National Authority," which he wrote. It was presented to the Senate February 25, 1887. The Bill was at last defeated, and no serious attempt to interfere with elections in the South was repeated.

Of this Minority Report Senator O. H. Platt, a Republican Senator from the State of Connecticut, said: "I do not think that I have ever seen the doctrine which that school of lawyers hold so ably set forth as in the minority report submitted by Senator George upon the bill to provide for national inquests. . . .

"He may have been called a follower of John C. Calhoun, but I believe, Mr. President, that Mr. Calhoun never stated the doctrine that the Constitution conferred upon our Government only certain delegated and specific powers with such force, ability and clearness as was stated by Senator George in that report. I believe that had he lived in the days of Calhoun he would have been esteemed certainly as great a Senator and as great a man as was Calhoun."

After the stupendous struggle of 1875 which resulted in restoring to the white people of Mississippi the control of their affairs, they were able to maintain it year after year, but exposed always to the same inimical forces which were so hardly overthrown in that memorable campaign. A revision of the existing constitution was seen to be necessary in order to place the maintenance of that control on a more stable footing. The project of calling a convention for that purpose was championed by Senator George. In this he was opposed by not a few of the ablest men of the State who believed it to be impossible to achieve the end sought, and among these were the other two of the three most conspicuous and powerful leaders of public opinion to whom the people looked for political guidance. Nevertheless, confident of his own judgment and with characteristic courage when convinced that he was right, Senator George threshed out the question before the people and won. The convention was held at the Capital in 1890 and he sat in it as a member from the State at large.

On this matter I quote from Senator Turpie of Indiana: "Some time before Senator George left Washington on this service he had, after a long reflection, and upon great consideration, drafted a proposed clause in the new constitution

upon the right of suffrage. This draft he submitted, for inspection and examination, to a few of his Senatorial colleagues, upon the single question of its constitutionality, whether there was anything in its terms in conflict with the Constitution of the United States. Receiving for answer, without dissent, that the clause in question was not in conflict with the Federal Constitution, he carried the draft of it with him upon his journey home, and at the proper time offered it as a section in the new constitution. It was adopted, after full debate, in very nearly the text and terms of the original draft, and is now a part of the organic law of the State.

"His prolonged and laborious service in the Senate had been largely devoted to questions nearly akin to the suffrage clause. Year after year he had thought and spoken concerning the force bill and other methods then proposed of Federal intervention with the election systems of the Southern States and upon the still broader theme of inter-race relations. Always his utterances had been without threat, without menace, earnest, sincere, but temperate, considerate, devoid of violence. His conduct had been that of the statesman, that of the philanthropist and the philosopher. He purposed good for all, good for both races, white and black, but especially he kept faith with those of his own race and lineage. He was not willing to abandon the claim of his own race to a certain political supremacy. He thought this was an indispensable necessity for the welfare of both races. At last the opportunity came to him, as the author of this special provision on the subject of suffrage, to formulate this policy in the law of his own country.

"The most beneficent consequences have resulted from his labors. There is now a stable, firm, unbroken pacification of the government in his State. Civilization and social order have been reestablished. The former disastrous conditions of riot, confusion, and bloodshed have ceased. All classes and colors are at rest. Dissent has been merged into accord and satisfaction. What he wrought in this magnificent domain for human progress and happiness has not died with him. The future generations of that historic Commonwealth will say of him in the years yet to be, Senator George gave to Mississippi and to all the inhabitants thereof the priceless boon of peace."

"In the session of the United States Senate next succeeding its promulgation this constitution," says General Catchings, "was violently and relentlessly assailed. I know of nothing in the annals of Congress at all to be compared with Senator George's defense of it on the floor of the Senate. His adversaries were literally overwhelmed by his skill in debate, his masterful logic, and the infinite wealth of his learning. Brushing aside almost contemptuously the insinuations, innuendoes, and implied charges so copiously indulged in, he boldly challenged them to indicate in what particular the State of Mississippi had transcended its powers, or to point out so much as a single clause in the constitution adopted by it which was in contravention of the Fourteenth and Fifteenth Amendments of the Federal Constitution. No answer came, and, so far as the United States Senate is concerned, the attack upon Mississippi's constitution has never been renewed from that day to this."

In framing that constitution Senator George has been generally accorded the largest measure of responsibility. And in an opinion delivered by the Supreme Court of the United States not long after the Senator's death the validity of that constitution was expressly affirmed.

As the time approached for Senator George to go for a third election before the Legislature which would convene in January, 1892, the entire State was agitated over what was called the subtreasury plan, a scheme temptingly put before the farmers, under the auspices of the Farmer's Alliance, as a measure for their especial relief. It attracted the keenest attention in many Southern and Western States and was made the leading issue of the campaign in Mississippi.

Senator George was known and recognized as the great friend and champion of the farmers and they expected him to go with them in advocating the scheme. To oppose it seemed to invite defeat, and more than one public man held his peace. But when Senator George was asked his opinion and his support was solicited he published a powerful letter declaring the plan to be both illusory and unconstitutional and that he would oppose it. He canvassed the entire State with such aggressive power as not only to defeat the scheme in Mississippi, but to "utterly destroy it root and branch in every section of the country where it had found support."

The canvass attracted wide-spread attention, and the interest commanded by the courage and skill which fought and conquered the delusion was universal. His overwhelming election immediately followed.

Something like three years before the expiration of this his third term in the Senate Senator George announced that he would not offer himself for a fourth election, but would retire to private life at the end of the term he was serving, feeling that the time remaining, after having attained the three-score and ten years he would then have reached, would be better employed in another way if he should be freed from the vexations of public office. For his purpose he needed more continuous leisure than he felt he could honestly command if he continued to hold his place in the Senate. During the several previous years he had severely taxed his great strength in preparing for ultimate publication this work which is just now issued from the press in incomplete form. He intended to write a third and concluding part in which he hoped once for all to demonstrate the unconstitutionality of that portion of the reconstruction legislation which interferes with the undoubted right of the State to regulate the suffrage.

It is greatly to be regretted that it was not possible for Senator George to give to the country a considered discussion of this great question. But before the contemplated period of his approaching leisure had arrived he was laid low in death, eighteen months before his term in the Senate would have closed.

In Mississippi City, on the coast of the State he loved and served so well, he passed from life in this world on the 14th day of August, 1897, being not quite 71 years old. On the 17th day of the same month in the town of Carrollton he was buried from the Baptist Church, of which in his final years he was a member.

Senator George once said of another distinguished Mississippian what was even more true of himself: "He knew the people; he mingled and associated with them; he was one of them. He knew their thoughts, their wishes, and their aspirations. He also knew their troubles and trials—their hindrances to success in life. He sympathized with them in their joys and their sorrows. He believed they were capable of self-government. He believed they knew their own interest. He

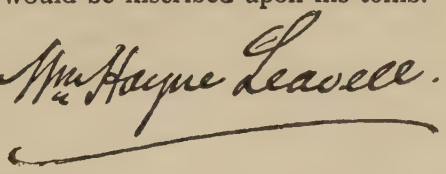
had faith that in the long run they would be, must be, right. . . . Having this faith in them, he was accustomed in forming his judgment on public measures to give a large consideration to the opinions of the people."

Another has said of him:

"It was his pride that he sprang from the people and theirs that he rose so high. . . . They were grateful for his good offices and he for their approval and support. He made their cause his own, and it was like him to espouse and urge it with all the intensity of his nature."

I cannot more fitly conclude this brief sketch of the life of one whose nature was as simple as his career was great than by quoting the words of his distinguished colleague, General Walthall:

"Proud as he justly was of his name and fame as a lawyer, soldier, judge and Senator, and careful ever to guard them, if his epitaph were limited to a single sentence most accordant with his preference, I am not singular in the belief that 'A friend of the people' would be inscribed upon his tomb."



GUATEMALA, January, 1915.

INTRODUCTION

In contributing an introductory note to the present volume, I yield to the request of Dr. Leavell, by whom the preface is written. The extent of my acquaintance with the author, the late Senator George of Mississippi, would scarcely justify me in offering to connect my name with the publication of his work. It happened, however, to be my fortune, while he occupied a seat in the United States Senate, to see something of his labors, to observe the high ability and integrity which he brought to the consideration of public questions, and also to appreciate the strong human qualities and attachments which, although they came little to the notice of the general public, peculiarly endeared him to his friends. His colleague, the late Senator Platt of Connecticut, a most competent judge, has borne testimony to the extraordinary ability which characterized his minority report on the bill to provide for Inquests under National Authority. It is not going too far to say that the same ability and earnestness generally characterized whatever he did. His understanding was both sure and profound. His premises granted, he reached his conclusions by an unerring logic. United with this gift was an unusual capacity for labor, and a conscientious care that knew no weariness.

Senator George's exposition of constitutional questions naturally attracted wider attention than did most of his other public discussions, but he manifested no less ability in dealing with questions of a different order. In the debate on the unratified fisheries treaty with Great Britain, which took place in the summer of 1888, he bore an important part. The subject was entirely new to him, but it may confidently be affirmed that

there was no speech made in the course of the long and exhaustive controversy that exhibited a more thorough investigation of the subject, a fuller comprehension of its history and legal relations, or a more candid treatment of it than did his.

While our author marshalled his facts and his arguments with logical precision, he habitually expressed himself accurately, forcibly and often with singular felicity. These qualities he exhibited even in writings entirely devoid of any element of popular interest or excitement, such as his digest of the decisions of the Supreme Court and of the High Court of Errors and Appeals of Mississippi, which was published in 1872. This work, which was produced in the course of five years in the intervals of absorbing professional pursuits, he declared to have been a labor of love. This circumstance accounts not only for the exceptional excellence of the performance, but also for the distinct and marked personal element in it. This trait may be said to have given to all his work a certain characteristic. His heart as well as his mind entered into his task. Just as the encouragement and commendation of his brethren at the bar led him to prosecute to completion his digest, so, when he reached the end of his labors, his feelings led him to give to it an additional personal flavor by dedicating it to an old companion in arms. This dedication I have never heard mentioned; but, having chanced to see it on the first occasion when I made use of the volume, I was so much struck with its simple eloquence, and its depth and tenderness of feeling, that it has ever since occupied a place in my recollection. It reads as follows:

TO THE MEMORY OF
FRANCIS MARION ALDRIDGE,
WHO FELL AT THE BATTLE OF SHILOH,
THIS WORK IS DEDICATED.

A profound lawyer—a pure and an honest man—a firm and upright patriot; he offered his life, and its rich and varied gifts, to the cause of his native land.

That cause was to him a faith—and its followers, brothers; and no one was more devoted to its fortunes than he.

Our brethren of the Bar, in this as in all times past, were the stern advocates of freedom, and they staked all upon the issue of that cause, in the bloody arbitrament of battle. Our heroes were vanquished, and the victor is now the judge.

As misfortune endears the sufferer, so he who falls in battle in the defence of his convictions, bears thenceforth a charmed name.

To that cause, which bound up my own most cherished sympathies, and to my professional brethren, who bore so large a share of its burdens, I desire to place the expression of my attachment and admiration upon this record, frail though it may be.

"It is a cause, and not the *fate* of a cause, which is a glory."

All those who, like Aldridge, whether they fell or survived, gave their best efforts to their country, are enshrined in my recollection; but I here select his name, not because it is the highest or the brightest amongst them all, but because it was to me the best beloved.

In the sentiments expressed in this dedication may be found the key to the present work. Senator George was convinced that the struggle between the North and the South was to be regarded as a contest over the principle of the balance of power. Candidly admitting (p. 52) that the main purpose of the South in advocating the annexation of Texas was to increase "its waning power," he maintains that the North, in opposing the annexation, was animated by an antagonistic design. Whether the reader shall agree or disagree with the contention that the question of the balance of power rather than that of slavery was the fundamental cause of the conflict, it serves to denote what the author means when he speaks of those who sustained the cause of secession as being the advocates of freedom. The contest being, as he contended, in its essence a struggle for political power, the South, according to this view, in supporting what it conceived to be its rights under the Constitution, was asserting the cause of political freedom.

Although Senator George strenuously maintains on this ground the justice of the Southern cause, he is yet ready to concede that the passions of the hour were not confined to one

side. Referring to the debates on the Wilmot Proviso and other measures associated with the controversy as to the extension of slavery, he remarks (p. 56) upon the "passion and heat of the debates" and observes that "there seemed to be insanity on both sides with reference to the Territories." His present argument is intended as an appeal to the calm and deliberate judgment after the passions of the hour have subsided and the embers of controversy have ceased to glow; and as such it will be accepted and pondered by the reader in a fair and dispassionate spirit. This is what the author obviously desired; and he would have asked for nothing more.

New York, March 10, 1915.

THE POLITICAL HISTORY OF SLAVERY IN THE UNITED STATES

BOOK I

CHAPTER I

NEGRO SLAVERY AT THE TIME OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES

In the present aspect of our affairs,—that is, considering the jealousies and even the animosities that are becoming more and more intensified between the North and the South, as well as the disposition that is ever increasing in the stronger section to dominate the weaker,—it is becoming necessary to think over calmly and seriously the causes that have produced these evils, and to ascertain, if we can, the remedy, if remedy there be.

It will not be denied that the Federal Constitution was formed by the voluntary action of the several States, and that in the beginning each State was free to join the union by a ratification of the Constitution or to remain a free, separate, sovereign, and independent State by rejecting it.

Different interests and diverse aspirations in the several States were manifested in the Federal Convention of 1787. It was then noted that the main divergence would be marked by lines that separated the Northern States from the Southern. The Northern States were commercial and the Southern agricultural. Because of this difference in pursuits arose diversity of interests and, as a consequence, inharmonious and contradictory views in relation to the powers to be granted to the Federal Government. But the greatest cause of diversity and dissension grew out of the institution of slavery. When this is stated only a half-truth is told. That slavery was then, and has been since, the most prominent of all causes of dissension is true; but it was not so much slavery *per se* as that diverse views in relation to that institution became the occasion of marking more distinctly the division that naturally grew up with respect to other issues.

At this era, when slavery has been abolished throughout the world and is condemned by the consensus of civilized na-

tions, it is difficult to appreciate fully the very different status which that institution occupied in past eras of human history. Slavery and traffic in slaves are older than the records of human society. In Greece slavery antedated the earliest traditions; the father of the Jewish nation was a slaveholder and a purchaser of slaves.[1]

Except in Australasia, slavery has prevailed in every portion of the globe: the Saxon even carried it in its most repulsive form into England. It was practised by all religions; both the Christian and the Mohammedan indulged in it. The latter left no alternative to Christian captives but apostasy or servitude, and Christians in return treated infidels in the same way.[2]

The Moors, after the conquest of Granada and their subsequent expulsion from Spain, in the latter part of the fifteenth century, and almost contemporaneously with the discovery of America, settled on the southern shores of the Mediterranean in North Africa and engaged in enslaving Christians.

And the Christians, naming all Africans "Moors," enslaved them in return. Yet Negro slavery is not the invention of the white man, for the earliest accounts of black men attest that Negro masters held black men of their own race as slaves and sold them to others.[3] There were Negro slaves in Greece and Rome.[4]

In 990 A. D. the slave trade was opened by the Moors in Central Africa. About the middle of the fifteenth century there seems to have grown up a prejudice against enslaving Africans as such, and one Gonzales, having imported into Europe Africans that were merely Moors, was commanded to return them, which he did; and the Moors gave him as ransom, not only gold, but *black* Moors, with curled hair, and thereupon Negroes became objects of commerce.[5]

Not long after the settlement of Virginia Negro slaves were brought here, and even the slavery of whites was permitted for a time in Virginia and New England. "Not the

[1] Bancroft's History, Vol. I, p. 159.
[2] *Ibid.*, p. 161.
[3] *Ibid.*, p. 164.
[4] *Ibid.*, p. 165.
[5] *Ibid.*, p. 166.

Scots only," says Bancroft, "who were taken on the field of Dunbar were sold into servitude in New England, but the Royalist prisoners taken at the battle of Worcester." [1] The leaders of the insurrection of Penruddock were shipped to America for sale as slaves.

Slavery existed in all the American colonies at the time of the Declaration of Independence. There had been before that date slavery of whites, as we have seen, and also slavery of Indians, as well as of Africans. But in the main the slavery of whites had ceased at that date. Vermont, however, in her constitution of 1777, after declaring the "inherent and unalienable" right of liberty in all men, who were also declared to be born "equally free and independent," provided further: "Therefore, no male person born in this country or brought from over sea ought to be holden by law to serve any person as a servant, slave, or apprentice after his arrival at the age of twenty-one years, nor female in like manner after the arrival at the age of eighteen years, unless they are bound by their own consent. after they arrive at such age, or bound by law for the payment of debts, damages, fines, costs, or the like."

While slavery was recognized in all the colonies as a matter of purely domestic concern, it was at an early day made the subject of protection by interstate compact.

In 1643 A. D. a Confederacy was formed of four New England Colonies,—Massachusetts, Plymouth, Connecticut, and New Haven.[2] The articles of this New England Confederacy not only provided for the return of the fugitive slave, but also classed persons among the spoils of war and doomed captured men to slavery; and as early as 1637 Negro slaves were introduced into New England from Providence Isle.

In 1626 Negro slaves were introduced into New York, being brought by way of the West Indies and directly from Guinea. And Bancroft adds: "That New York was not a slave State, like Carolina, is due to climate and not to the superior humanity of its founders." [3]

The importation of Negroes into New Jersey was encour-

[1] Bancroft's History, Vol. I, p. 175.
[2] *Ibid.*, p. 420.
[3] *Ibid.*

aged by a present of seventy-five acres of land for each able-bodied slave imported.[1]

In Pennsylvania William Penn took care that there should be an agreement that the whites should love the red man, but he himself employed and owned Negro slaves. He chartered and encouraged a society of traders that agreed that after fourteen years' service the negro slave should remain under the severe conditions of adscript of the soil.[2]

At a later day Penn attempted to legislate, not for the abolition of slavery, but for the sanctity of marriage among slaves and for their personal safety. The latter object was effected. But the former,—sanctity of marriage, which would have been the forerunner of family life and freedom,—was defeated.[3]

In his will he directed that his own slaves be emancipated, but his direction was not observed by his son, and it seems there was no law in Pennsylvania that could compel him to do so; if there was, public opinion in favor of slavery was so strong that the law could not be enforced.

Although the slavery of whites and Indians was at one time tolerated in the Colonies, it was for obvious reasons discontinued. There was a natural repugnance to the slavery of one man to another. This sentiment secured the freedom of the whites, while the red man was never a profitable slave, and that fact secured his freedom. Bancroft says: "There is not,—in all the Colonial legislation of America,—one law which recognized the rightfulness of slavery in the abstract. The real question at issue was from the first, not one of slavery and freedom generally, but of the relations between the European and African races." The Englishman in America tolerated and enforced, not the slavery of man, but the slavery of the man "who was guilty of a skin not colored as his own. In the skin lay the unexpiated and, as it was held, the inexpiable guilt. To the Negro whom the benevolence of his master enfranchised the path of social equality was not open."

Yet it was not the mere color of his skin as color that constituted the reason of his enslavement, and the denial to him, when free, of social rights and political power, but it was

[1] Bancroft's History, Vol. I, p. 420.
[2] *Ibid.*, Vol. II, p. 403.
[3] *Ibid.*

because the color was invariably accompanied by other marks, —physical, moral, and mental,—that caused this discrimination against him. For the same historian remarks: "The natural increase of this prolific race, combined with imperfect development of his moral faculties, gave to human life in the eyes of man himself an inferior value. Humanity did not expend itself on the individual, or the family, or even on the nation." The Negro was "gross and stupid, having memory and physical strength, but undeveloped in the exercise of reason."

And on a later day Mr. Lincoln declared there were "physical differences between the two races which would forever forbid them living together on terms of political and social equality."

However this may be, it is a fact that at the date of the birth of our country, July 4, 1776, the Negro was a slave, not only in every one of the Colonies, but in his own native land and in every civilized country. But, notwithstanding all the States were slaveholding at the time of the Declaration of Independence, and all but one remained so at the time of the meeting of the convention to frame the Federal Constitution in 1787, it was foreseen then that slavery would cease to exist in the Northern States. It was not, as Bancroft remarks, superior humanity, but climate that fixed the status of States as to slavery. The physical constitution of the negro "directed his home in the New World toward the sun. Even the climate of Virginia was too chill for him. His labor, therefore, increased in value as he proceeded south, and hence the relation of master and slave came to be eventually a Southern institution."

The result was an evident future event at the date of the convention. Hence, differences arose in that body as to questions connected with slavery. In the Congress of the Confederation each State had an equal vote, and this rule was also observed in the deliberations of the convention.

This rule was not satisfactory to the larger States. Taxation, or rather contribution to the general fund under the Confederacy, had been according to the value of land owned by private parties within each State. This method had been found unsatisfactory. All the States had had

equal representative power in the Congress, and this was also unsatisfactory. After a great deal of debate, not unaccompanied with threats of a refusal to join the new union, both these questions were finally compromised. The States were to be equal in the Senate and to be represented according to Federal population in the House. The Federal population was to consist of all free persons and three-fifths of the slaves, and direct taxes were to be apportioned on the same basis. Then there arose a division as to the continuance or suppression of the African slave trade. From a sectional point of view all these questions were regarded as serious, and so was the power of regulating commerce,—a power that the North desired to control.

Mr. King, of Massachusetts, arguing the question of representation, said: "If the latter [the Northern States] expect some preferential distinctions in commerce and other advantages which they expect to derive from the connection [the Union], they must not expect to receive them without allowing some advantages in return. Eleven of the thirteen States had agreed to consider slaves in the apportionment of taxation, and taxation and representation ought to go together."

He was fully convinced that the question concerning a difference of interests did not lie where it had hitherto been discussed, between the great and the small States, but between the Southern and the Eastern. For this reason he had been disposed to yield something in the proportion of representation for the security of the Southern. No principle could justify giving them a majority. They were brought as near an equality as was possible. He was not averse to giving them a still greater security, but did not see how it could be done.

The committee of detail on the 6th of August, 1787, reported a scheme for the Constitution. By the fourth section of Article VII taxation of exports was prohibited, and taxation by Congress of imported slaves was also prohibited. By section six it was provided that no Navigation Act should be passed except by two-thirds of each house. Upon this provision arose controversy and debate. Colonel Mason, of Virginia, referring to the taxation of exports, declared "he went on a principle often advanced, and in which

he concurred, that a majority, when interested, would oppress the minority. This maxim has been verified by our own legislature [Virginia]. If we compare the States in this point of view, the eight Northern States have an interest different from the five Southern States; and have in one branch of the legislature thirty-six votes against twenty-nine, and in the other in the proportion of eight against five. The Southern States have, therefore, ground for their suspicion." [1]

Luther Martin, of Maryland, arguing in favor of the power to suppress the foreign slave trade, said: "As five slaves are to be counted as three freemen in the apportionment of representatives, such a clause would leave an encouragement to this traffic." He held that "slaves weakened one part of the Union, which the other parts were bound to protect; the privilege of importing them was therefore unreasonable." He further declared that the importation of slaves "was inconsistent with the principles of the Revolution, and dishonorable to the American character." [2]

Mr. Ellsworth, of Connecticut, said: "Let every State import what it pleases. The morality and wisdom of slavery are considerations belonging to the States themselves. What enriches a part enriches the whole, and the States are best judges of their particular interest." [3]

Mr. Pinckney said: "South Carolina can never receive the plan [the proposed Constitution] if it prohibits the slave trade. If the States be all left at liberty on this subject, South Carolina may perhaps, by degrees, do of herself what . . . Virginia and Maryland already have done." [4]

Mr. Sherman, of Connecticut, disapproved of the slave trade; "yet, as the States were now possessed of the right to import slaves, as the public good did not require it to be taken from them, and as it was expedient to have as few objections as possible to the proposed scheme of government, he thought it best to leave the matter as they found it. He observed that the abolition of slavery seemed to be going on in the United States, and that the good sense of

[1] 5 Elliot's Debates, p. 456.
[2] *Ibid.*, p. 457.
[3] *Ibid.*
[4] *Ibid.*

the several States would probably by degrees complete it." [1]

Colonel Mason, of Virginia, replied as follows: "This infernal traffic originated in the avarice of British merchants. The British government constantly checked the attempts of Virginia to put a stop to it. This great question concerns not the importing States alone, but the whole Union. . . . Maryland and Virginia have already prohibited the importation of slaves expressly. North Carolina has done the same in substance. All this would be in vain, if South Carolina and Georgia be at liberty to import. The western people are already calling out for slaves for their new lands, and will fill that country with slaves, if they can be got through South Carolina and Georgia. Slavery discourages arts and manufactures. The poor despise labor when performed by slaves. They prevent the immigration of whites who really enrich and strengthen a country. They produce the most pernicious effect on manners. Every master of slaves is born a petty tyrant. They bring the judgment of Heaven on a country. As nations cannot be rewarded or punished in the next world, they must be in this. By an inevitable chain of causes and effects, Providence punishes national sins by national calamities. I lament that some of our eastern brethren have, from a lust of gain, embarked in this nefarious traffic. As to the States being in possession of the right to import, this was the case with many other rights now to be properly given up. I hold it essential, in every point of view, that the General Government shall have power to prevent the increase of slavery." [2]

Mr. Ellsworth replied: "As I never owned a slave I cannot judge of the effects of slavery on character. However, if it is to be considered in a moral light, we ought to go further and free those already in the country. As slaves also multiply so fast in Virginia and Maryland that it is cheaper to raise than import them, whilst in the sickly rice swamps foreign supplies are necessary, if we go further than is urged, we shall be unjust toward South Carolina and Georgia. Let us not intermeddle. As population increases, poor laborers will be so plenty as to render slaves useless.

[1] 5 Elliot's Debates, p. 457.
[2] *Ibid.*, p. 458.

Slavery in time will not be a speck in our country." [1]

Mr. Pinckney said: "If slavery be wrong, it is justified by the example of all the world. . . . In all ages one-half of mankind have been slaves. If the Southern States were let alone, they will probably of themselves stop importations. I myself, as a citizen of South Carolina, would vote for it." [2]

General Pinckney declared "it to be his firm opinion that if he and all his colleagues were to sign the Constitution, and use their personal influence, it would be of no avail toward obtaining the assent of their constituents. South Carolina and Georgia cannot do without slaves. As to Virginia, she will gain by stopping the importations. Her slaves will rise in value, and she has more than she wants. It would be unequal to require South Carolina and Georgia to confederate on such unequal terms. . . . He contended that the importation of slaves would be for the interest of the whole Union. . . . He admitted it to be reasonable that slaves should be dutied [taxed] like other imports; but should consider a rejection of the clause as an exclusion of South Carolina from the Union." [3]

Mr. Baldwin, of Georgia, regarded the importation of slaves as a local and not a national matter. "Georgia was decided on this point. . . . If left to herself, she may probably put a stop to the evil." [4]

Mr. Wilson, of Pennsylvania, favored the taxing of imported slaves.

Mr. Gerry, of Massachusetts, "thought we had nothing to do with the conduct of the States as to slaves, but ought to be careful not to give any sanction to it [slavery]." [5]

Mr. Dickinson, of Delaware, thought it inadmissible upon any principle of honor and safety "that the importation of slaves should be authorized to the States by the Constitution. . . . He could not believe that the Southern States would refuse to confederate on the account appre-

[1] 5 Elliot's Debates, p. 458.
[2] *Ibid.*, pp. 458-9.
[3] *Ibid.*, p. 459.
[4] *Ibid.*
[5] *Ibid.*

hended; especially as the power was not likely to be exercised immediately by the general government." [1]

Mr. Williamson, of North Carolina, thought the Southern States should not be members of the Union if the clause (prohibiting taxation of imported slaves) was agreed to.

Rufus King, of Massachusetts, "thought the subject should be considered in a political light only. If two States will not agree to the Constitution, as stated on one side, he could affirm with equal belief, on the other, that great and equal opposition would be experienced from the other States. He remarked on the exemption of slaves from duty, whilst every other import was subjected to it, as an inequality that could not fail to strike the commercial sagacity of the Northern and Middle States." [2]

Mr. Langdon, of New Hampshire, was strenuous for giving the power of taxation of slaves to the General Government.

General Pinckney "thought himself bound to declare candidly that he did not think South Carolina would stop her importations of slaves in any short time; but only stop them occasionally, as she does now. He moved to commit the clause that slaves might be made liable to an equal tax with other imports." [3]

Mr. Rutledge, of South Carolina, said: "If the Convention thinks that North Carolina, South Carolina and Georgia will ever agree to this plan, unless their right to import slaves be untouched, the expectation is vain." [4]

Gouverneur Morris wished the whole subject to be committed, including the clauses relating to taxing exports and to a navigation act. "These things may form a bargain among the Northern and Southern States." [5]

Mr. Butler, of South Carolina, declared that he would never agree to the power of taxing exports.

Mr. Sherman, of Connecticut, said "it was better to let the Southern States import slaves than to part with them if they made that a *sine qua non*. He was opposed to a tax

[1] 5 Elliot's Debates, p. 460.
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*

on slaves imported as making the matter worse, because it implied they were *property*. He acknowledged that, if the power of prohibiting the importation should be given to the general government, it would be exercised. He thought it would be its duty to exercise the power."

Mr. Randolph was for "committing in order that some middle ground might, if possible, be found. He could never agree to the clause as it stands. He would sooner risk the Constitution." The committal was made. Ayes: Connecticut, New Jersey, Maryland, Virginia, North Carolina, South Carolina, Georgia,—seven. Nays: New Hampshire, Pennsylvania, and Delaware,—three. And Massachusetts, absent.

Mr. Pinckney, of South Carolina, and Mr. Langdon, of New Hampshire, both moved to commit section six, relating to the navigation act.

Mr. Gorham, of Massachusetts, did not see the propriety of the committal. "Is it meant to require a greater proportion of votes [than two-thirds, as the sixth section required]?" He desired it to be remembered that the Eastern States had no motive to union but a commercial one. . . . They were not afraid of external danger, and did not need the aid of the Southern States.

Mr. Wilson, of Pennsylvania, favored committal in order to reduce the proportion of votes required.

Mr. Ellsworth, of Connecticut, was for taking the plan as it was. "This widening of opinions has a threatening aspect. If we do not agree on this middle and moderate ground [two-thirds vote in order to frame a Navigation Act], I am afraid we shall lose two States, with such others as may be disposed to stand aloof; should fly into a variety of shapes and directions, and most probably into several confederations—and not without bloodshed."

It was committed to one member from each state. Yeas, nine,—New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia; nays, two,—Connecticut and New Jersey. And the other clauses above noted about imported slaves and exports were sent to the same committee, consisting of Langdon, of New Hampshire; King, of Massachusetts; Johnson, of Connecticut; Livingston, of New York; Clymer, of Pennsylvania; Dickinson, of Delaware; Luther Martin, of Mary-

land; Williamson, of North Carolina; Madison, of Virginia; C. C. Pinckney, of South Carolina, and Baldwin, of Georgia.

The committee reported as to slave importation as the clause now stands, except that taxation of ten dollars per head, as it now reads, was by the committee provided for by a tax not exceeding average duties laid on imports, and the year 1806 was recommended as the date for the end of prohibition of power of Congress instead of 1808.

The committee reported also that the fifth section about a capitation tax and the sixth article, which required the assent of two-thirds of each to pass a Navigation Act, be stricken out.

I have set out this debate with some fulness that it may be seen that in that great convention there were sectional jealousies and sectional interests clustering around the slave question, yet growing out of and connected with other great issues, and that these produced then a Northern and a Southern difference. It will be noted that the strongest opposition to the slave trade came from Virginia and Maryland,—Colonel Mason and Luther Martin denouncing it in the strongest terms. It will also be noted that Virginia and Maryland were slave-breeding States, and that slave importation would have conflicted with the domestic industry of slave breeding in these States. It will also be noted that next to these two in the strenuousness of opposition was Delaware, and that Connecticut, through both Mr. Sherman and Mr. Ellsworth, two of the ablest men in the convention, was an apologist for the position of Georgia and South Carolina in favoring importation. Mr. Ellsworth went so far as even to insinuate that the opposition of Virginia and Maryland to slave importation was on account of their interests as slave breeders, and further to declare that the prohibition of the slave trade would be unjust to Georgia and South Carolina.

He also declared that it was a matter solely for each State, in which opinion Mr. Gerry, of Massachusetts, concurred, while Rufus King declared it should be looked at purely from a political and not from a moral standpoint.

It will be noted also that Colonel Mason, while entertaining the strongest anti-slavery views, yet saw there was a North and a South, and that there would be, and was even

then, a conflict in interest between them. It will also be noted that he complained that the North had a majority in the representation, and he declared it was a maxim in politics that a majority, when interested, would oppress the minority. Rufus King, too, so far agreed with the reasonableness of these apprehensions as to express himself to the effect that the difference in interest between the States did not lie between the larger and the smaller, but between the Southern and the Eastern, and that he thought it his duty to yield on the question of representation something to the security of the Southern States, and that he was willing to go even further, in order to give the Southern States still greater security. Gouverneur Morris regarded the whole matter,—including slavery, taxes, exports, and the Navigation Act,—as a fit subject "for a bargaining between the Northern and Southern States." Mr. Gorham, of Massachusetts, felt at liberty to say "that the Eastern States had no motive to union but a commercial one, and that they felt no fear of external danger and had no need of the aid of the Southern States."

And finally it will be noted that all these matters,—taxation and prohibition of the importation of slaves, taxation of exports and the Navigation Act,—were referred to a committee of one from each State for settlement, and that the bargain, finally consummated, was the Constitution as it now stands on these points.

Proceeding thus far, we find in the very inception of the Government differences on the subject of slavery,—contests as to representation in both Houses, based on the natural desire of the human heart for political power, whether for aggressive or defensive purposes, and differences as to the interests of States and sections, which interests could be promoted or depressed by the action of Government.

As our business now is mainly with the slave question, these other matters will only be noticed as they tend to make that plainer.

It has been seen that all the colonies, North and South, participated in the introduction of Negro slaves into the country. On this point it is well now to introduce an unimpeachable witness, though the testimony was not given for some years after the events we have been relating. During

the heat of the Missouri controversy in 1820, hereafter to be more fully set out, a petition was sent from the citizens of Newport, Rhode Island, against the admission of Missouri as a slave State. That petition said:

"That slavery, as it now exists in the United States, in the opinion of your memorialists, can never be made a matter of reproach to the existing Government or present generation. It was an evil introduced into the colonies by the parent State, and acquiesced in to a great degree by the colonies themselves, in an age when the traffic in slaves was pursued by all nations without suspicion of its enormity.

"The Northern colonies participated in it equally with the Southern, and the navigation of the New England ports, and particularly of this town, was employed continually on the African coast, in the transportation of slaves to the different American markets, and by means of American capital. There can be no reproach, therefore, cast upon our Southern brethren for the introduction of this evil, which, as your memorialists conceive, will not equally attach itself to ourselves and to the English Nation. We were all equally disposed to embark in the traffic, and to avail ourselves of its proceeds, and the guilt, if any there be, must be shared in an equal degree by the parties concerned." [1]

Slavery of the Negro was here. The African was here by the equal fault of all sections and all States. That slavery, though obnoxious to the principle on which our Government was founded, was yet tolerated, and it was tolerated, as we have seen, on account of the peculiarities of the Negro, both physical and moral.

It would have been well if the warning voice of Colonel Mason (as we have quoted it) had been heeded in the formation of the Constitution, and if power had been given to the Federal Government to prohibit the further introduction of Africans from the time of the inauguration of the Constitution instead of postponing it for twenty years. In that fatal twenty years there were introduced into this country such a number of this prolific race that all thoughtful men must look to the future with apprehension and alarm.

The differences of opinion concerning slavery were settled in the Federal Convention by compromise, or, as Gouv-

[1] Annals, 1st Session, 16th Congress, Vol. II, pp. 2452-3.

erneur Morris expressed it, by "bargain between the Northern and Southern States." These compromises were founded on the concession on all sides that slavery was a State institution, subject to the will of each State to establish or abolish as it should deem best in its own judgment, and embraced the three points of controversy: five slaves as three freemen in representation and taxation, the delivery of fugitives from slavery, and what has been stated about the African slave trade.

Very early after the inauguration of the Government under the Constitution it was found that there was discontent as to these provisions, and also a disposition on the part of some of the States to evade, if not directly to disregard, these compromises, especially as to the representation of slaves.

CHAPTER II

ACQUISITION OF LOUISIANA

As has been stated, the controversies on the subject of slavery were always connected with other questions. The main question was sectional political power. It will be observed that this came up on all occasions when a measure was before the public, upon the decision of which there might be an augmentation of power in one section of the Union, and relative diminution of power in another. And it will be interesting, as well as instructive, to note how the question of the relative powers of the State and Federal Governments was always decided in each section in accordance with its views in opposition to or approval of a measure that might detract from or add to its own power.

When the treaty for the acquisition of Louisiana came before the House of Representatives for the appropriations necessary to pay for that Territory this fact was made manifest.

That appropriation was opposed by a majority of the representatives from Massachusetts, all from Connecticut, and a majority from New Hampshire; though one of the best speeches made in favor of it was by Mr. Elliott, of Vermont. Mr. Thatcher, of Massachusetts, in opposing the appropriation, said that "The *Confederation* under which we now live is a partnership of States, and it is not competent to it to admit a new partner but with the consent of all the partners." [1]

Mr. Griswold said: "Such a power [to admit new States from territory acquired since the formation of the Constitution] would be directly repugnant to the original compact between the States, and a violation of the principle on which that compact was formed. It has been already well observed that the union of the States was formed on the

[1] Annals, 1st Session, 8th Congress, p. 454.

principle of a copartnership, and it would be absurd to suppose that the agents of the parties who have been appointed to execute the business of the compact, in behalf of the principals, could admit a new partner, without the consent of the parties themselves." [1] This is the very essence of the Resolutions of 1798 and 1799.

It was not denied that the United States could acquire new territory by conquest or purchase, but the opposition was to that provision of the treaty which provided for the eventual admission of Louisiana into the Union.[2]

But this ground of opposition, based on expediency, was clearly on the change it would effect in the distribution of political power. Mr. Thatcher objected that if the treaty went into effect it would carry from its present center a great portion of the population of the United States, that it would probably remove the seat of Government, and that it might dismember the Union.

Mr. Griswold argued that "The Government having been formed by a union of States, it is supposable that the fear of an undue or preponderating influence in certain parts of the Union must have great weight in the minds of those who might apprehend that such an influence might ultimately injure the interests of the States to which they belonged; and although they might consent to become parties to the Union, as it was then formed, it is highly probable they never would have consented to such a connection, if a new world was to be thrown into the scale, to weigh down the influence which they might otherwise possess in the National Councils." [3]

This, it will be remembered, was on the bill to appropriate money to carry out the plighted faith of the Government to pay for Louisiana.

In 1811 the question as to the admission of Louisiana into the Union was before Congress. Admission was opposed by the great preponderance of members from New England.

Mr. Josiah Quincy, one of the ablest men in the country, was the leader in the contest. Louisiana was slave territory, and was to be admitted as a slave state. He argued that the

[1] Annals, 1st Session, 8th Congress, p. 461.
[2] *Ibid.*, p. 463.
[3] *Ibid.*, p. 462.

influence of the slave votes upon the political power of the eastern portion of the country "and the anticipated transmission of power to the west were subjects of great jealousy to some of the best patriots in the Northern and Eastern States at the time of the adoption of the Constitution," and that these patriots, if they had foreseen that the population beyond the Mississippi was to be brought into Congress "to frame our laws, control our rights, and decide our destiny, would not for one moment have listened to it."

"They were not madmen," he declared. "They had not taken degrees at the hospital of idiocy. They knew the nature of man and the effect of his combinations in political societies. They knew that when the weight of particular sections of a confederacy were greatly unequal the resulting power would be abused; and that it was not in the nature of man to exercise it with moderation."

He pressed with great force the effect of the admission of Louisiana on the relative political power of the other States, declaring "that the proportion of political power subject only to the internal modifications permitted by the Constitution is an inalienable, essential, intangible right," and "that when it is touched the fabric is annihilated," and that "on the preservation of these proportions depend our rights and liberties."

He spoke of the constitution as a political compact, averring that the proportion of the political power of each sovereign State constituting the Union depends upon the number of States "which have a voice under the compact." Like Mr. Griswold and Mr. Thatcher in 1803, he spoke of the States as "partners," and denounced the wrong of admitting new partners contrary to the terms of the contract, stating it was wholly inconsistent with the "intent of the contract and the safety of the States which established the association." He stated interrogatively, "Is there a moral principle of public law better settled, or more conformable to the plainest dictates of reason than that the violation of a contract by one of the parties may be considered as exempting the other from its obligations?"

And again he said: "I am compelled to declare it as my deliberate opinion that, if this bill passes, the bonds of this Union are virtually dissolved; that the States which compose it are free from their moral obligations, and that, as it

will be the right of all, so will it be the duty of some to prepare definitely for a separation—amicably, if they can, violently if they must." [1]

On the passage of the bill to admit Louisiana, not a member from New Hampshire nor Rhode Island nor Connecticut voted for it, and only one out of four from Vermont and five out of fourteen from Massachusetts voted for it.

So at this early day we see that there was opposition to the three-fifths slave representation in the House of Representatives, as provided for in the Constitution. The jealousy of sectional interests and power and the determination to maintain this power even at the cost of a dissolution of the Union were also made manifest. These manifestations then came from the Northern States. Hereafter it will be seen that similar sentiments came from the South.

These proceedings took place on the eve of the war with Great Britain. Before that war was over there was another manifestation of sectional jealousy, to which attention is now invited.

[1] Annals, 3d Session, 11th Congress, pp. 524 *et seq.*

CHAPTER III

THE HARTFORD CONVENTION

During the War of 1812 with Great Britain, discontent of a very violent, not to say revolutionary, character existed in New England, especially in the States of Massachusetts, Rhode Island, and Connecticut.

The Hartford Convention met on the call of the Legislature of Massachusetts, the invitation being directed by name only to the New England States. Connecticut and Rhode Island, through their Legislatures, accepted the call. Official delegates were appointed by the authorities of these States, and there were also delegates representing local communities in New Hampshire and Vermont.

The Resolution of Massachusetts calling the convention provided for twelve delegates to it to "confer with delegates from the New England States, or any other, upon the subject of their public grievances and concerns; and upon the best means of preserving our resources; and of defense against the enemy; and to devise and suggest for the adoption of their respective States such measures as they may deem expedient, and also to take measures, if they shall think proper, for procuring a convention of delegates from all the United States, in order to revise the constitution thereof and more effectually to secure the support and attachment of all the people by placing all upon a fair basis of representation."

In the letter to the other States of the Union, sent by the President of the Senate and the Speaker of the House, it was stated that the object of the convention was to deliberate upon the dangers to which the eastern section of the Union was exposed by the war, and to devise, if practicable, measures of security and defense consistent with the preservation of their resources from total ruin and adapted to their local situation, mutual relation, and habits; and not repugnant to their obligation as members of the Union. It was

also suggested that the convention inquire whether the interests of those States demanded persevering endeavors by each State to procure such amendments to the National Constitution as might secure to them their equal advantage; and also to consider the propriety of obtaining a convention of all the States, or such of them as might approve of the measure, with a view to obtaining such amendment.

The letter concluded with an avowal of the attachment of the people of Massachusetts to the National Union and to the rights and independence of their country.

The answer of Connecticut was contained in a report to the Legislature, in which complaint was made of the conduct of the war. It stated that "occupying a comparatively small territory and naturally associating during the Revolutionary War with States whose interests were identified with our own interests and inclinations led us to unite in the great national compact, since defined and consolidated by the Constitution of the United States; that they anticipated from the Union the preservation and advancement of their dearest rights and interests; that whilst the Father of his Country, and other good and wise men, guided our councils, they were not disappointed. But the present national administration had formed a coalition with Napoleon, aspiring to the dominion of the world, and had left unattempted no means, however destructive or hazardous, to aid him; that protection is the first and most important claim of the States on the Federal Government, and a primary condition essential to the obligation of every compact between rulers and their subjects. To obtain that, as a principal object, Connecticut became a member of the National Confederacy."

The report also stated: "They duly appreciate the great advantages which result from the Federal compact, were the government administered according to the sacred principles of the Constitution. They have not forgotten the ties of confidence and affection which bound these States to each other during their toils for independence; nor the national honor and commercial prosperity which they mutually shared during the happy years of a good administration. They are at the same time conscious of their rights and determined to defend them. Their sacred liberties, those inestimable institutions, civil and religious, which their venerable fathers had

bequeathed to them, are, with the blessings of heaven, to be maintained at every hazard and never to be surrendered by the tenants of the soil, which the ashes of their ancestors have consecrated."

The report concludes with recommending the acceptance of the invitation of Massachusetts as an eligible method of combining the wisdom of New England in devising, on full consultation, a proper course to be adopted consistent with our obligations to the United States.

A resolution was adopted to "appoint seven delegates for conference with other delegates from the New England States for the purpose of devising and recommending such measures of safety and welfare of these States as may consist with our obligations as members of the National Union."

Rhode Island, by its Legislature, accepted the invitation, noting that its Governor had been requested by the Legislature to confer with "our neighboring sister States," and appointed delegates "to confer with such other delegates as are, or shall be, appointed by other States upon the common dangers to which these States are exposed, and upon the best means of cooperating for our mutual defense against the enemy and upon such measures which it may be in the power of said States, consistently with their obligations to adopt, to restore and secure to the people thereof their rights and privileges under the Constitution of the United States."

That the convention was to be solely of the New England States is evident, not only from the language of the call, but from the answers of Connecticut and Rhode Island.

What is meant in these proceedings by a "fair basis of representation" in the call made by Massachusetts, and by measures "consistent with their obligations as members of the Union," will be evident from the sequel.

The convention met on December 14, 1814, at Hartford. Among the delegates were the most distinguished names in New England, including Cabot, Prescott, Harrison Gray Otis, Nathan Dane, and Chauncey Goodrich. At that time New Orleans was threatened by the British army and fleet.

The convention, after a session of several weeks behind closed doors, made a report that was drawn with great skill and ability. It is not deemed necessary to set out the whole report, but only to note some of the salient points of it.

This report noted the difficulty of devising means of defense against danger and relief from oppression from acts of their own government without violating constitutional principles or disappointing the hopes of a suffering and injured people; and it stated that the recommendation of patience and firmness to the distressed sometimes drives them to despair. "But," continues the report, "when abuse reduced to a system and accumulated through a course of years has pervaded every department of the Government, and spread corruption through every region of the State, and when these are clothed with the forms of law and enforced by an executive whose will is their source, no summary means of redress can be applied without resort to direct and open resistance."

Apologizing for not recommending this open resistance, the report states that the experiment of resistance, when justifiable, cannot fail to be painful to good citizens, and that precedents for resistance to the worst administration are eagerly seized upon by those who are hostile to the best.

"Necessity alone can sanction a resort to this measure, and it should never be extended in duration or degree beyond the exigency, until the people, not merely in the fervor of sudden excitement, but after full deliberation, are determined to change the Constitution.

"It is a truth not to be concealed that a sentiment prevails to no inconsiderable extent that the administration has given such construction to that instrument and produced so many abuses under color of its authority that the time for a change is at hand." The report goes on to say that those so believing regard the present evils as incurable and intrinsic under the present Constitution, and that no change can aggravate the misery of the country. This opinion may prove correct but the evidence is not yet conclusive that it is, and as measures adopted on that assumption might be irreversible, they submit some reflections to reconcile the people to a course of moderation and firmness.

After adverting to the once high prosperity under the Constitution, and to the present miseries, and expressing the hope that their brethren in other States may yet undergo a revolution in opinion, they proceed to give reasons against a present dissolution of the Union, as follows:

"Finally, if the Union be destined to be dissolved, by reason of multiplied abuses of bad administration, it should, if possible, be the work of peaceful times and deliberate consent. Some new form of confederacy should be substituted among these States which shall intend to maintain the Federal relation to each other. Events may prove that the causes of our calamities are deep and permanent; they may be found to proceed, not merely from the blindness of prejudice, pride of opinion, violence of party spirit, or the confusion of the times; but they may be traced to implacable combinations of individuals with States to monopolize power and office, and to trample, without remorse, upon the rights and interests of the commercial section of the Union. Whenever it shall appear that these causes are radical and permanent, a separation by equitable arrangement will be preferable to an alliance by constraint among nominal friends, but real enemies inflamed by mutual hatred and jealousy, and inviting by intestine divisions contempt and aggression from abroad."

The report then denies the authority of the United States over the militia as it had been exercised, and denies the power of Congress to compel the militia and other citizens, by forcible draft or conscription, to serve in the regular army, declaring "that an iron destiny can impose no harder servitude on a citizen than to force him from his home and his occupation to wage offensive wars undertaken to gratify the pride and passion of his master; that the forcible draft as recommended by the Secretary of War is not delegated by the Constitution to Congress, and the exercise of it would be not less dangerous to the liberties of the citizen than hostile to the sovereignty of the State; that it is as much the duty of the State authorities to watch over the rights reserved as of the United States to exercise the powers which are delegated."

They then proceed to declare it to be undeniable that Acts of Congress in violation of the Constitution are absolutely void, but it "does not, however, consist with the respect and forbearance of a *Confederate State* towards the General Government to fly to open resistance upon every infraction of the Constitution. The mode and energy of the opposition should always conform to the nature of the violation,

the intention of its authors, the extent of the injury inflicted, the determination to persist in it, and the danger of delay. But in cases of deliberate, dangerous, and palpable violations of the Constitution affecting the sovereignty of the State and the liberties of the people, it is not only the right, but the duty, of such State to interpose its authority for their protection in the manner best calculated to secure that end. When emergencies occur which are either beyond the reach of judicial tribunal, or too pressing to admit of the delay incident to their forms, States which have no common umpire must be their own judge and execute their own decision."

The report then sets out nine grievances that should be remedied, one of which is as follows: "The admission of new States into the Union, formed at pleasure in the western region, has destroyed the balance of power which existed among the original States and deeply affected their interests."

Proceeding to enumerate certain defects in the Constitution which should be removed by amendment, they specify the three-fifths representation of slaves allowed to the Southern States, insisting that representation should be based on the number of free inhabitants.

Concerning this matter the report states: "These [the Southern States] are entitled to slave representation by a constitutional compact. It is therefore merely a subject of agreement. . . . It has proved unjust and unequal in its operation. Had this effect been foreseen the privilege would probably not have been demanded; certainly not conceded. Its tendency in the future will be adverse to that harmony and mutual confidence which are more conducive to the happiness and prosperity of every confederated State than a mere preponderance of power, the prolific source of jealousies and controversies, can be to any of them."

The report also specifies this amendment: "No new State shall be admitted into the Union without the concurrence of two-thirds of both houses."

"This amendment," says the report, "is deemed to be highly important, and, in fact, indispensable. In proposing it it is not intended to recognize the right of Congress to admit new States without the original limits of the United

States. . . . At the adoption of the Constitution, a certain balance of power among the original parties was considered to exist. . . . By the admission of these States that balance has been materially affected and, unless the practice be modified, would undoubtedly be destroyed. The Southern States will first avail themselves of their new Confederates to govern the East, and finally the Western States, multiplied in number and augmented in population, will control the interest of the whole. . . . None of the old States can find an interest in creating permanently an overwhelming Western influence."

It is not necessary to note further the amendments proposed, except to say that they propose to restrict the power of Congress to lay an embargo, and to interdict commerce and declare war without the concurrence of two-thirds of both Houses, except in case of invasion,—making naturalized citizens ineligible to Federal office or as Members of Congress, prohibiting the President to be elected from the same State for more than two terms in succession, and making the President ineligible to reelection.

The last of the resolutions recommends,—in case the applications named in the foregoing be unsuccessful and peace be not concluded, and the defense of these States be neglected, as has been the case,—that a new convention be called to meet at Boston the following June.

The convention adjourned on January 5, 1815, just three days before the great victory of General Jackson at New Orleans; and, peace having been concluded, the meeting at Boston never took place.

More, possibly, of the proceedings of the convention has been set out at this place than is consistent with a proper arrangement of the subject herein discussed. What we are now considering are the sectional jealousies and disturbances growing out of what is called the balance of power between the two sections of the Union and the slavery question as contributing thereto. That part of the report, as above set out, which admits the rightfulness of the remedy by secession will be hereinafter considered. Now we note the other phases of the report, its insistence on the exclusion of new States, the complaint of the disturbance of the balance of power by such admission, and the complaint of political power

granted to the Southern States by the three-fifths representation of slaves. It will be noted that the report demands the proposed amendment to the Constitution as to the admission of new States as indispensable, and insists on the preservation of the balance of power as established in the beginning.

CHAPTER IV

THE MISSOURI QUESTION

The war with Great Britain ended, and there was for a time a cessation of sectional disputes; but in a few years came the application of Missouri for admission, and the same sectional jealousy was again aroused. The East and the North changed their position in reference to the balance of power. The effort now was not to preserve the balance, but to destroy it, by giving a preponderance to the North. Missouri was a part of Louisiana and was slave territory. To her as a territory slavery was allowed, and when she applied for admission it was as a slave State. Her first application was in the year 1818. In the next year an Enabling Act was passed. Resistance was made to her admission, not on the ground assumed in respect to Louisiana,—that it was a violation of the Constitution to admit new States formed of territory acquired since the adoption of the Constitution,—but on the ground that there should be no admission of any more slave States.

On December 18, 1818, the Missouri territory presented a petition for admission into the Union as a State, and a bill in accordance therewith was introduced in the House on February 14, 1819.

Talmadge, of New York, offered an amendment prohibiting the further introduction of slavery into the proposed new State, and providing that all children of slaves born after the admission of the State should be free when twenty-one years old.

The debate on this amendment was conducted with great ability and attracted the attention of the whole country. Taylor, of New York; Mills and Fuller, of Massachusetts; Livermore, of New Hampshire, and others favored the restriction, and Barton and Pindall, of Virginia; Henry Clay; Holmes, of Massachusetts, and many others spoke against it. After

ten days of debate the vote stood on the first branch of the amendment,—prohibiting the further introduction of slavery,—eighty-seven yeas to seventy-six nays; and on the second branch,—freeing afterborn children of slaves,—eighty-two yeas to seventy-eight nays.[1]

The debate showed that the restriction was supported, not so much on any ground of humanity or kindness to the Negro, as on a determination to prevent an increase in the political power of the South that would come from an addition to the number of slave States. The effort was to destroy the so much lauded balance of power by giving a preponderance to the North and East as against the South. It was evident that, as the foreign slave trade had been suppressed, the increase in the number of slaves could only come by an excess of births over deaths among those slaves already in the Union. It was also evident that this excess of births over deaths would come only from a condition in which the slaves were well treated, and that if there should be an increase in the excess, it would come from the fact that the condition of the slaves would be affected favorably by their diffusion over new territory. And it was manifest that such amelioration would come from such diffusion over the new and fertile lands of the West, giving to the slave that greater comfort and happiness that come to all who migrate to sparsely settled communities, and inhabit fertile lands.

The speeches of Henry Clay are not reported in the Annals of Congress, but it appears from a reply made to him by Mr. Talmadge that Mr. Clay pressed this consideration. Mr. Talmadge said that Mr. Clay had "pressed into his service the cause of humanity," had "pathetically urged us to withdraw our amendment and suffer this unfortunate population to be dispersed over the country," urging that "they will be better fed, better clothed and sheltered, and that their whole condition will be greatly improved." [2]

Expressions showing that restriction was not for the benefit of the Negro, but of the white man, will be hereinafter quoted.

The bill passed the House as amended. In the Senate the restriction amendment was voted down by twenty-two

[1] Annals, 15th Congress, 2d Session, p. 1214.
[2] *Ibid.*, p. 1175.

yeas to sixteen nays on the first clause,—prohibiting further introduction of slavery,—and by thirty-one yeas to seven nays on the second clause,—freeing afterborn slaves. The House refused to concur, and the bill failed. At the opening of the sixteenth Congress, Missouri again applied for admission into the Union, and Maine, then a part of Massachusetts, with the consent of the latter also applied.

Several efforts were made to pass the Missouri bill. Storrs, of New York, in the way of a compromise, proposed that the Missouri River should be the northern boundary of the State. He withdrew this measure afterward in order to amend it by a proviso that slavery should be prohibited in all the territory of the United States outside of Missouri and north of the thirty-eighth parallel and west of the Mississippi River, with provision for the return of fugitive slaves.

Taylor, of New York, proposed to amend the bill by requiring the State by its Constitution to abolish slavery, but excepting from its operation all slaves then in Missouri, and providing also for a return of fugitive slaves.

In the meantime the House had passed the bill to admit Maine. In the Senate the bill was amended by adding Missouri without restriction as to slavery, and three Northern senators,—Taylor, of Indiana, and Thomas and Edwards, of Illinois,—voted for the amendment.[1]

Thomas, of Illinois, moved to amend the Missouri part of the bill by prohibiting slavery from all territory of the United States west of the Mississippi River and north of 36° 30′, except in Missouri. Barton, of Virginia, moved to substitute 40° for 36° 30′, which was lost. Then Trimble, of Ohio, moved to amend by excluding slavery from all territory west of the Mississippi, except in Louisiana, Arkansas, and Missouri. This was lost. Ayes, twenty; nays, twenty-four,—all the Northern senators voting for it, except Noble and Taylor, of Indiana, and Edwards and Thomas, of Illinois.

On Thomas's amendment,—36° 30′,—the vote was thirty-four ayes to ten nays, all the latter being from the South except the two Indiana senators. On the passing of the bill as amended the yeas were twenty-four to twenty nays. Hunter, of Rhode Island, and Parrott, of New Hampshire, join-

[1] Annals, 16th Congress, 1st Session, p. 424.

ing Edwards and Thomas, of Illinois, were the Northern senators voting for the bill. Two Southern senators,—Smith, of Virginia, and Macon, of North Carolina,—voted in the negative. The House refused to concur in the amendment adding Missouri to the Maine bill. On the 28th of February the Senate refused to recede from so much of the amendment as admitted Missouri with Maine. For receding there were twenty-one ayes, all from the North; against receding there were twenty-three, all from the South, except Taylor, of Indiana, and Thomas, of Illinois.

On the motion of Thomas, of Illinois, to recede from the amendment prohibiting slavery north of 36° 30′, the yeas were eleven, all from the South, except Noble and Taylor, of Indiana; and the nays were thirty-three, all from the North, except Johnson and Logan, of Kentucky; Johnson, of Louisiana; King and Walker, of Alabama; Lloyd and Pinkney, of Maryland; Stokes, of North Carolina, and Williams, of Tennessee,—nine. Then a conference between the two houses was called.

On the first conference there was a disagreement. On the second it was recommended that the Senate recede from all its amendments, leaving the bill for the admission of Maine alone. It was further recommended that the restrictive clause in the House bill for the admission of Missouri be stricken out, and that the Thomas amendment prohibiting slavery north of 36° 30′ be added.[1] Maine was admitted March 3, 1820. In the meantime the House had, March 1, passed the Missouri bill with the restriction as to slavery,—ayes, ninety-one; nays, eighty-two.[2] In the Senate the restrictive clause was stricken out. Hunter, of Rhode Island; Lanman, of Connecticut; Thomas, of Illinois, and Parrott, of New Hampshire,—four Northern Senators,—voted to strike out.[3]

Trimble, of Ohio, renewed his amendment prohibiting slavery in all the western territory acquired from France, except in Louisiana, Arkansas, and Missouri, stating that he offered it in the hope that it would furnish the basis of an agreement between the two Houses. It was voted down by twelve ayes to thirty nays. Thomas's amendment prohibit-

[1] Annals, 16th Congress, 1st Session, p. 471.
[2] *Ibid.*, p. 1572.
[3] *Ibid.*, p. 467.

ing slavery north of 36° 30′ was then adopted and the bill passed the Senate March 21, 1820. In the House of Representatives, on the motion to concur in striking out the slavery restriction, the ayes were ninety and nays eighty-seven. Only twelve Northern Representatives voted for striking it out,—Baldwin and Fullerton, of Pennsylvania; Bloomfield, Eddy, and Kensy, of New Jersey; Meigs and Storrs, of New York; Foote and Stevens, of Connecticut, and Hill, Holmes, and Mason, of Massachusetts.

On the question of concurring in the insertion of the Thomas amendment, the yeas were one hundred and thirty-four, nays forty-two. Of the nays thirty-seven were from the South and five from the North,—Adams, Allen, and Folger, of Massachusetts; Buffum, of New Hampshire, and Gross, of New York. The bill was thus passed.

We turn now to the debates, which with the resolutions of States and petitions show that the main ground of objection to the admission of Missouri was the increase of political power in the South.

Mr. Mellen, from Massachusetts, urged in the Senate that the admission of Missouri without the restriction would destroy the balance intended in the formation of the Constitution in allowing three-fifths representation of slaves and equality of suffrage in the Senate.

New Jersey presented resolutions in favor of the restriction, insisting that the three-fifths representation of slaves was unjust to the Northern States.[1] Pennsylvania made a strong protest by resolution of her Legislature against the admission of Missouri, and insisted, among other things, that such admission would be in contravention of the understanding when three-fifths representation was allowed for slaves.

Mr. Burrill, of Rhode Island, referring to the admission of Missouri, said: "We also violate the true spirit and intention of that compromise in the Constitution by which three-fifths of the slaves are to be included in the apportionment of Representatives. This was agreed to to satisfy the then existing slaveholding States. . . . If we now introduce new slaveholding States, we increase the slave representation far beyond the number originally contemplated as possible." [2]

[1] Annals, 16th Congress, 1st Session, p. 235.
[2] *Ibid.*, p. 217.

Mr. Smith, of South Carolina, said in reference to the admission of Missouri that "the people of Massachusetts, so far from wishing Maine a separate State, voted down the scheme and said the State of Massachusetts should remain entire. But, sir, whenever Missouri applied for admission, the Legislature of that State, to keep up what the gentleman [Rufus King] calls the balance of political power, immediately passed a law to authorize the division." He made a similar remark as to New York's consent to the admission of Vermont, stating that this consent was refused until Kentucky applied for admission.[1]

Mr. King's speech is not reported.

Mr. Hemphill, of Pennsylvania, objected that the balance of power between the original States would be disturbed, as the owner of one hundred slaves had as much power in representation as sixty-one freemen.

Mr. Plumer, of New Hampshire, said: "The free States would never have come into the Union had they supposed it possible that within the first generation they would be in a minority in the Government. . . . At this moment the representatives of slaves alone, exclusive of whites, exceed the numbers and on this very question outvote all the representatives of six of the eleven of the non-slaveholding States. Feeling the weight of slave representation, and knowing with what fatal activity it increases, is it strange that the free States should wish to prevent its existence in States hereafter to be admitted?"

Mr. Holmes, of Massachusetts, who all along opposed the restriction, responded to the argument of Taylor, of New York, based on the alleged injustice to the free States of the three-fifths slave representation. He insisted that it was a part of the Constitution; that the objection was nothing new; and on this point he quoted from the instructions of Massachusetts to her delegates in the Hartford Convention, in which this three-fifths representation was objected to as unfair, and as an impediment to the support and attachment of all the people to the Constitution.[2]

Mr. Smith, of Virginia, had argued in favor of diffusing the slave,—that is, the colored,—population throughout the

[1] Annals, 16th Congress, 1st Session, p. 418.
[2] *Ibid.*, p. 966.

Union in order to lessen the danger arising from the intermixing of heterogeneous races. To this Mr. Cook, of Illinois, who all through favored the restriction, responded that it afforded to his "mind a warning argument of the necessity of their emancipation and colonization." "For," said he, "I repeat it, that if the warning voice of experience tell us that it has been the fate of all countries where two distinct and heterogeneous orders of society have existed, sooner or later to wade through wars and bloodshed, then even America, the seeming favorite of Heaven, unless timely measures are adopted to avoid it, will not share a better fate. It is with me, therefore, a leading consideration to limit the sphere of this dangerous population, with an eye to its ultimate eradication from the bosom of our country." He then referred approvingly to resolutions offered by Mr. Meigs, of New York, proposing the use of the Navy to suppress the slave trade, and the devotion of the proceeds of the sales of the public lands to emancipation and colonization; and he declared that for one he was "prepared to devote every inch of the public soil west of the Mississippi, if so much shall be necessary, to the redemption of our country from this fatal, this deplorable evil." He also declared that we must get rid of this evil or it would get rid of us, and that there were but three ways to do this: first, emancipation and colonization; second, amalgamation; third, extirpation.

He declared that the last two were so revolting and so uncongenial to our nature that no one could look on either as an expedient.[1]

And Mr. Hemphill, of Pennsylvania, gave as a reason for supporting the restriction of slavery in these territories that "the preference ought to be given to a white population over a black,"—not a slave,—"population." [2]

Mr. Burrill, of Rhode Island, said: "I am not only averse to a slave population, but also to any population composed of blacks, and of the infinite and motley confusion of colors between the black and the white." [3]

The memorial of the citizens of Newport, Rhode Island, is also noteworthy. We have at another place set out what

[1] Annals, 16th Congress, pp. 1109, '10, '11.
[2] *Ibid.*, p. 1134.
[3] *Ibid.*, p. 217.

that memorial confessed as to the equal guilt of all sections and States for the existence of slavery. In another part of their memorial they show how much their opposition to the admission of Missouri is based on philanthropy toward the Negro. After saying that the new States would probably increase illicit slave importations from Africa, and that there would consequently be an increase in the slave population, the memorialists said that even if this were not true, they would be "still of the opinion that it would be unwise in Congress to permit the extension of slavery into the new States. The slaves which might then be introduced into Missouri, from the Union at large, would multiply, as your memorialists conceive, to a degree hitherto unknown in the country, not only from the increased facilities of subsistence, but the comparative mildness of her climate. Whilst these causes were operating to perpetuate the evil in the West, the slave population in the Atlantic States must of necessity rise with the demand for labor and the means of life; and the event would be, as your memorialists can confidently predict, that the numbers of persons of this unhappy description in the United States would be a thousandfold greater than if the slaves were confined, as your memorialists would advise, to the States now holding them." [1]

This method of decreasing slavery by denying to the slaves a mild climate and facilities for subsistence raises a serious question as to whether philanthropy had anything to do with the opposition to the admission of Missouri. The fact that James D. Wolfe was about that time elected to the United States Senate from Rhode Island, and that he had been, up to the last date at which slave importation was allowable, extensively engaged in increasing in that way the number of slaves in the United States would also suggest that that mode of increase was less objectionable than the augmentation of numbers from natural increase occasioned by the comfortable condition of the slaves already here. This view derives support from the statement made by Mr. Macon, of North Carolina, in the debate that "the only time he ever heard the slave trade defended in Congress was by a member from Rhode Island." [2]

[1] Annals, 16th Congress, 1st Session, p. 2455.
[2] *Ibid.*, p. 230.

Mr. Pinkney, of Maryland, in his great speech on the subject, said: "There are those in this House who appear to think . . . . that the particular restraint now under consideration [the restrictive clause about slavery] . . . . benevolent as respects the unhappy victims [slaves], whom with a novel kindness it would incarcerate in the South, and bless by decay and extirpation." [1] He also said: "Their [the slaves] civil condition will not be altered by the removal from Virginia or Carolina to Missouri. They will not be more slaves than they now are. Their abode, indeed, will be different, but their bondage the same. Their numbers may possibly be augmented by the diffusion, and I think they will. But this can only happen because their hardships will be mitigated, and their comforts increased." [2]

The Enabling Act provided for the election of delegates to a convention to form a constitution and State government, "and that the said State, when formed, shall be admitted into the Union upon an equal footing with the original States in all respects whatever . . . . Provided the same [Constitution and Government] when formed shall be Republican and not repugnant to the Constitution of the United States."

The passage of the act was deemed to be the end of the controversy. But the spirit of sectional strife was so strong, the love of power so potent, the determination to allow no increase in the political power of the Southern States so pervading, that this expectation was doomed to disappointment. The Constitution framed was unobjectionable, but for the fact that exception was taken to a clause in it forbidding the entry and settlement of free Negroes and Mulattoes in the State. This clause was made the ground of a persistent and bitter opposition to the admission of the State. The committee of the Senate to whom the final resolution for the admission of Missouri was referred,—consisting of Lowndes, of South Carolina; Sergeant, of Pennsylvania, and Smith of Virginia,—reported a resolution for admission, with a written report. In this report they stated that it was best, and also in accord with principle, to leave the constitutionality of the provisions that were objectionable to the decision of the courts. This reasonable view, however, did not prevail. A

[1] Annals, 16th Congress, 1st Session, p. 393.
[2] *Ibid.*, p. 401.

long and bitter controversy arose over this provision. The debates were able, but in many instances acrimonious and bitterly sectional.

Eaton, of Tennessee, at an early period of the debate offered a proviso to the resolution for the admission of Missouri "that nothing herein contained shall be construed to give the assent of Congress to any provision in the constitution of Missouri, if any such there be, which contravenes that clause of the Constitution of the United States which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." It was this clause that the opponents of the resolution claimed was violated by the objectionable provision in the Constitution of Missouri.

Here was a distinct proposition to leave the decision of the point to the courts. But this would not satisfy the opponents of admission. Maine had already been admitted. The balance of power so much insisted on as a thing sacredly to be observed had been broken, and the preponderance was in the North. The politicians and statesmen of that section seemed determined not to take a step which might tend to restore the equilibrium of political forces.

In view of the then condition of the legislation of the Northern States in reference to free Negroes, and their subsequent action on the same subject, it seems that the objection to admission now put forth was a mere pretense to prevent the restoration of the balance of power to the South.

In Ohio, whose Representatives and Senators insisted on the objection, there was a law then in force, and had been since 1807, prohibiting any free Negro from settling in the State, unless he would give bond and surety in the penalty of five hundred dollars for his good behavior and to indemnify the State against his becoming a pauper. And it was a criminal offense to harbor or employ such a Negro who had not given the bond, and he was an incompetent witness in any case in which a white man was interested. No objection had been made to this.

In Massachusetts Negroes were excluded from enrollment in the militia, but were compelled to attend the calls for the militia and do such work as might be assigned them. They were good enough to do work about the camp, but

were not entitled to the privilege of freemen to bear arms for the defense of the country, and they had been expressly excluded in Massachusetts from serving in the army during the Revolutionary War.[1]

In the same State free Negroes and Mulattoes at this very time were prohibited from entertaining any Negro or Mulatto servant under penalty of five shillings, and if they were unable to pay this, they were to work at hard labor two days for each shilling of the fine.

Notwithstanding the abolition of slavery in Massachusetts, there seems to have been some kind of servitude there of free Negroes and Mulattoes; for by statute in existence at the time of this great controversy it was provided that free Negroes and Mulattoes should not be freed until bond and surety had been first given as indemnity against such free Negroes or Mulattoes becoming a public charge. And, to show that the statute was not passed from a merely speculative apprehension of evil, it was stated in the preamble that great charges and inconvenience had already occurred to divers towns from setting such persons free. At the same time it was the law of Massachusetts that if a Negro or Mulatto should strike any person of the English or other Christian races, he should be whipped at the discretion of the Justice, and intermarriage between whites and Negroes or Mulattoes was prohibited, and a penalty of two hundred and fifty dollars imposed on any minister who should solemnize such a marriage.

At almost the very date of the great controversy,—namely, in 1822,—Rhode Island had a revision of her laws; and intermarriage between whites and blacks was prohibited. And the granting of license for keeping taverns, ale houses, victualing houses, cook shops, oyster shops, and retailing liquors was prohibited "to any colored or black person," and in the same revision there was a statute which declared "that if any free Negro or Mulatto shall keep a disorderly house, or entertain any person at unseasonable hours, or in an extravagant manner," the town council was to break up the housekeeping of such Negro or Mulatto, and bind him out to serve for two years.

In Connecticut from 1774 to 1797,—embracing all the

[1] See *Post*, in extracts contained in Mr. Davis' speech.

Revolutionary War and all the period of the Government under the Articles of Confederation, and that portion of our history that covers the formation and adoption of the Constitution and the administration of General Washington,—there was a statute in force which, whilst it prohibited the importation of slaves, at the same time contained a provision that if any free Negro should travel without a written pass, and should be stopped or taken up, he should pay all charges on account thereof. In New Jersey and Vermont and New Hampshire they were not allowed to serve in the militia.

Mr. Smith, of South Carolina, brought out in debate a great many of these provisions and others.[1]

Mr. Smith also cited laws of the free States against the entry into them of the citizens of other States. He cited a law from Vermont giving the selectmen of a town power to remove from the State any person who came there to reside, and a person so removed, if he returned, was to be whipped. In Connecticut and New York there were statutes cited by him authorizing the removal from these States of persons coming into them. He cited a statute in Rhode Island prohibiting white persons from trading with free Negroes and Mulattoes, and providing further that if a white man were suspected of such trading and would not purge himself under oath, he was to be deemed guilty.

These statutes in existence then in the free States were not deemed grounds of objection even, and the States having these laws in force were the most active and unrelenting in pressing the objection against the clause of the Constitution of Missouri above alluded to.

Mr. Smith also showed that James D. Wolfe, the then senator-elect from the State of Rhode Island, was actively engaged in the slave trade in the year 1804, having ten vessels so employed. He also presented an official list of the vessels so employed, with their owners and consignees, entering the port of Charleston, South Carolina, in the years 1804-7, and from this list it appears that fifty-nine of these vessels belonged to Rhode Island, one to Connecticut, and one to Boston, while eighty-eight of the consignees were from Rhode Island. Of the slaves imported into Charleston in American vessels in those years two thousand and six were

[1] Annals, 16th Congress, 2d Session, p. 51 *et seq.*

by merchants and planters in South Carolina, and seven thousand nine hundred and fifty-eight by citizens of Rhode Island.[1]

From this it appears to some extent how the free States above named treated free Negroes and Mulattoes at the time that they were pressing for the recognition of their citizenship in Missouri as a condition precedent to her admission into the Union. It will be hereafter shown that this condition of the legislation of the Northern states as to free Negroes was not abnormal and confined to that particular period; but was continued with increasing severity until the very moment they determined to inflict Negro equality and Negro citizenship on the Southern States of the Union.

But, to go forward with the progress of the bill for the admission of Missouri, the House on December 13th defeated the resolution to admit Missouri: ayes, seventy-nine; nays, ninety-three.[2]

The Senate passed a resolution for that purpose, and on July 15, 1821, it was referred to a committee in the House. The resolution as it passed the Senate is as follows: "Resolved, that the State of Missouri shall be, and is, hereby declared one of the United States of America, and is admitted into the Union on an equal footing with the original States in all respects whatsoever; provided, that nothing herein contained shall be construed to give the assent of Congress to any provision in the Constitution of Missouri (if any such there be) which contravenes that clause of the Constitution which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States."

Various efforts were unsuccessfully made to amend the resolution so as to make it agreeable to the House. Mr. Clay moved for a committee of thirteen to consider the matter, and the motion was agreed to.

The committee consisted of seven from the free States and six from the slave states, Mr. Clay being chairman. This was on February 2, 1821. On the 10th Mr. Clay made a written report and recommended an amendment of the Senate Resolution so as to make it declare that Missouri

[1] Annals, 16th Congress, 2d Session, p. 51 *et seq.*
[2] *Ibid.*, p. 670.

shall be "admitted into this Union on an equal footing with the original States, in all respects whatsoever, upon the fundamental condition that the said State shall never pass any law preventing any description of persons from coming to and settling in the said State who now are, or hereafter may become, citizens of any of the States of this Union; And provided also, That the Legislature of the said State, by a solemn public act, shall declare the assent of the said State to the said fundamental condition, and shall transmit to the President of the United States, on or before the fourth Monday of November next, an authentic copy of the said Act; upon the receipt whereof, the President, by proclamation, shall announce the fact; whereupon and without any further proceeding on the part of Congress, the admission of the said State into this Union shall be considered as complete; And provided further, That nothing herein contained shall be construed to take from the said State of Missouri, when admitted into this Union, the exercise of any right or power which can now be constitutionally exercised by any of the original States." [1]

The resolution was carefully guarded so as not to give the sanction of Congress to the clause in the Constitution of Missouri to which objection had been made. It declared that said clause should not be construed to exclude from the State any citizen of any other State; but the last proviso secured to the new State all the powers of any of the old States. This resolution the opponents of admission would not agree to, for in view of what has been stated concerning the legislation of New England and other States with reference to free Negroes, it would have resulted that that legislation was unconstitutional, and therefore null, or that the clause in the Constitution of Missouri, to which the opponents of admission objected, would be held valid, and the opponents of admission were not willing to accept such a result.

After a long debate the resolution amended as above set out was rejected: ayes, sixty-four; nays, seventy-three.[2]

[1] Annals, 16th Congress, 2d Session, p. 1079.
[2] *Ibid.*, p. 1102.

CHAPTER V

REPUDIATION OF COMPROMISE ON 36° 30′

Mr. Mallory, of Vermont, then renewed his former motion to amend so as to require Missouri to frame a Constitution prohibiting slavery. The motion,—notwithstanding the alleged compromise of the last session, by which Missouri was to be admitted as a slave state and slavery to be excluded north of 36° 30′,—secured two-thirds of all the votes of the non-slaveholding states,—the ayes being sixty-one, all from the North; the nays, one hundred and seven. Of the latter, only thirty-three were from the North, making nearly two to one from the North who directly repudiated the alleged compromise embraced in the prohibition of slavery north of 36° 30′.

The resolution was then agreed to in committee of the whole, the ayes being eighty-six and nays eighty-three. But so strong was the opposition to the admission when the vote came to be taken in the House that there were only eighty ayes to eighty-three nays.[1] A motion to reconsider was carried by a vote of one hundred and one to sixty-six, but on another vote taken February 2, 1821, the resolution was again defeated: ayes, eighty-two; nays, eighty-eight. Of the eighty-two ayes, one was from Pennsylvania, two from New Jersey, one from Rhode Island, one from Connecticut, seven from New York, and two from Massachusetts. Of the two from Massachusetts, one was from a district in Maine which had been recently admitted into the Union, and the other failed to be re-elected to the next Congress.

This seemed to end the matter; but Mr. Clay again came to the rescue. On February 22 the House, on his motion, agreed, by a vote of one hundred and one to fifty-five, to raise a committee of twenty-three to whom the question of admission was to be referred. Two days thereafter the com-

[1] Annals, 16th Congress, 2d Session, pp. 1115-16.

mittee reported the following resolution: "Resolved, That Missouri shall be admitted into this Union on an equal footing with the original States in all respects whatsoever, upon the fundamental condition that the fourth clause of the twenty-sixth section of the third article of the Constitution submitted on the part of said State to Congress shall never be construed to authorize the passage of any law, and that no law shall be passed in conformity thereto, by which any citizen of either of the States in this Union shall be excluded from the enjoyment of any of the privileges and immunities to which such citizen is entitled under the Constitution of the United States, with a proviso that the Legislature shall, by solemn public act, declare their assent to said fundamental condition, and transmit this act to the President by the fourth Monday in November, and thereupon the admission of the State shall be complete." [1]

The committee in this report divested the resolution of the second proviso contained in the first report, which secured, notwithstanding the first proviso, the same power to Missouri as belonged to the original States.

Mr. Allen, of Massachusetts, doubtless apprehending that the citizenship of the Negro could not be sustained under the Constitution of the United States, or perhaps being willing to interpose all possible obstacles to the admission of Missouri, moved to amend by striking out the word "citizen" wherever it occurred, and to insert "free Negroes and Mulattoes." A vote on this was prevented by a call of the previous question, which was sustained by one hundred and nine ayes, and there were fifty nays. On the final passage of the resolution there were eighty-six ayes to eighty-two nays,—four majority. Of this majority there were two from Pennsylvania, four from New Jersey, six from New York, one from Rhode Island, one from Connecticut, two from Massachusetts, one being from the part admitted as the new state of Maine,—in all sixteen representatives. All the rest from the Northern states, notwithstanding the alleged compromise of the preceding session, voted against the admission of Missouri.

In order to illustrate the foregoing statements, and at the same time to fortify the position that the slavery agita-

[1] Annals, 16th Congress, 2d Session, p. 1228.

tion mainly owed its origin, its continuance, and its violence to the contest involved in it for political power, I shall add the following facts:

The Legislature of New Jersey protested against the admission of Missouri as a slave State. The first resolution as presented to Congress is as follows: "Resolved, That the further admission of Territories into the Union without the restriction of slavery would, in their opinion, essentially impair the right of this and other existing States to equal representation in Congress (a right at the foundation of the political compact), inasmuch as such newly admitted slaveholding States would be represented on the basis of their slave population; a concession made at the formation of the Constitution in favor of the then existing States, but never stipulated for new States, nor to be inferred from any article or clause in that instrument." [1]

In the fifth resolution they asserted that Congress should exercise the power of excluding "in order to preserve the political rights of the existing states."

A memorial was presented from the citizens of Hartford, Connecticut, against the admission of Missouri. It breathed the same spirit on the subject of slave representation as did the celebrated convention held at that place seven years before. The memorialists disavowed all feelings of an ignoble jealousy that weighs all political questions in the petty scale of mere State interests, and measures every proceeding of the national Legislature by the narrow and contracted standard of advantages to the Northern and Southern, the Eastern and Western sections of our common country; they state that the principle of equality of men was waived in its application to "those States whose policy led them to make it a condition of their adoption of the Federal Constitution that they should retain the privilege of holding slaves, and that these slaves should go to increase the mass of their population which should be entitled to a voice in our National Councils." They aver that this was done in a spirit of compromise, and does not apply to new States. They urge that "the permission of slavery in the new States will be an unwarrantable departure from the principles of that compromise, which it is confessed led to the formation of that part of the Constitu-

[1] Annals, 16th Congress, 1st Session, p. 235.

tion which gives to the slaveholding States such an influence in the councils of the nation from a great mass of the population who are not recognized or treated as freemen." [1]

In the year 1818 Connecticut revised her Constitution and prohibited Negroes from voting, which provision remained in full force until it was made null by the Fifteenth Amendment. The memorialists could see no propriety in allowing one Negro slave to be counted as three-fifths of a white man, yet it was then a part of good statesmanship and just and equal to count a Negro as a full white man, though the Negro was entitled to no political privilege whatever and exercised no political power.

We have now seen how this celebrated controversy arose, how it progressed, on what motives it was founded, and to what ends and aims it looked. Like the opposition to the acquisition of Louisiana in the first instance, and the subsequent opposition to the admission of that State into the Union, the contest against the admission of Missouri was waged on motives of political power both in sections and in States.

In view of the subsequent events, the philosophic historian may well doubt whether the preeminence that the genius and patriotism of Southern Statesmen and warriors acquired in the early stage of our political life did not, in the end, contribute to her final overthrow and humiliation. Of the first thirty-six years of our life under the Constitution the Presidency was held for thirty-two years by citizens of Virginia; only four years were the portion of New England. That this was unsatisfactory to New England is seen in that resolution of the Hartford Convention that asked for an amendment of the Constitution prohibiting the reelection of a President and prohibiting also that he should be elected from the same State for more than two successive terms. When the Missouri question arose there had been a President from Virginia for seven terms and for five in succession. This continued predominance of Southern influence and power in the national affairs wrought the two-fold injury of dissatisfying the North and of begetting in the minds of Southern men a great reluctance to surrendering a power and influence they had so long enjoyed and exerted.

[1] Annals, 16th Congress, 1st Session, pp. 2460-1.

At the time of the adoption of the Constitution, the people were nearly all engaged in agriculture, and the Southern States, on account of their climate and soil being the best adapted to that business, were the richest. The accumulation of wealth by agriculture is necessarily slow. The building of large fortunes can come quickly and rapidly only from trade. At length commerce solely, then commerce with manufactures, had transferred the preponderance of wealth to the North. The institution of slavery, as predicted by Colonel Mason in the Federal Convention, proved unfavorable to commerce, to the arts, and to manufactures. That institution also had been a barrier to immigration. From these causes the contest for ultimate supremacy or preponderating influence in the Union had already been decided, and decided against the South. The admission of Missouri as a slave State could not, and did not, prevent this, and the North might well have waited patiently for the event that was sure to come; and the South would have been wiser had she ceased an unavailing contest in which she never could be victor.

If there was doubt about this, it was settled by the alleged compromise prohibiting slavery north of 36° 30′. By that the South gained the admission of Missouri and the subsequent admission of Arkansas, whilst all the immense territory now embraced in the states of Kansas, Nebraska, Iowa, Oregon, Minnesota, and a great part of Colorado, and in the states of Idaho, Montana, and Washington was surrendered. And more than this, it was dedicated by an irrepealable law of climate and production to free labor. The North might well have rested on the alleged compromise of 36° 30′ and have yielded assent to the admission of Missouri.

But so strong was the desire for sectional power and sectional aggrandizement that the North seized at the very next session of Congress upon the pretext that the clause in the Constitution of Missouri, before alluded to, was a deprivation of constitutional rights to free Negroes and Mulattoes, and resisted on that ground with more bitterness than before the admission of that State.

That this was a mere pretext has been abundantly shown by the reference that has been made to the statutes of Northern States in relation to free Negroes and Mulattoes. The

policy of these statutes continued to be carried out in the non-slaveholding States up to the time of the adoption of the Fifteenth Amendment.

As early as 1829, and perhaps earlier, Illinois prohibited Negroes and Mulattoes from settling in that State unless they had certificates of freedom; moreover, each settler was to give bond with good security in a penalty of one thousand dollars, on the condition that he would not become a charge upon the country, and that he would demean himself at all times according to law, and that he would punish any person hiring or giving sustenance to a Negro residing in the State in violation of these statutes with a fine of five hundred dollars. Marriages between whites and blacks were prohibited, and violators of these statutes were to be whipped with thirty-nine lashes and imprisoned one year. Stringent provisions were made in relation to apprenticing free Negroes and Mulattoes. In the Revision of the Statutes of 1833 there was a prohibition against bringing free Negroes into the State, unless bond and security were given to indemnify the country against such negroes becoming paupers. Negro servants were allowed to be whipped if they were lazy or guilty of disorderly behavior. Any assembly of them to the number of three or more for the purpose of dancing or revelling was punishable by a fine of twenty dollars on the owner of the house, and by the whipping and imprisonment of those assembled.

In 1845 it was enacted that any person bringing a Negro into the State for the purpose of freeing him was to be fined one hundred dollars.

By the Constitution of 1847 the Legislature was required at its first session to pass such laws as would *efficiently* prevent free persons of color from immigrating into the State and prevent effectually owners of slaves from bringing them to the State for the purpose of emancipating them. A law was passed by which any such immigrant Negro remaining in the State ten days was to be fined fifty dollars, and if he did not pay it he was to be sold for the fine, and after his service expired, if he failed to leave in ten days, he was to be fined one hundred dollars and sold again, and this process of fining and selling was to go on, the fine being increased fifty dollars at each succeeding step until the Negro died or left the State.

In Indiana very similar statutory and constitutional provisions were made. See her Constitution.

In nearly all the Northern States there were provisions excluding Negroes and Mulattoes from voting, from serving in the militia, from being jurors, and from being witnesses where white men were parties. All these statutes were unchallenged.

In 1857 Oregon formed a Constitution preparatory to admission into the Union. The Constitution of Oregon contained this provision:

"No free Negro or Mulatto, not residing in this State at the adoption of this Constitution, shall come, reside or be within this State or hold any real estate or make any contract or maintain any suit therein; and the legislative assembly shall provide penal laws for the removal by public officers of all such free Negroes and Mulattoes and for their effectual exclusion from the State, and for the punishment of persons who shall bring them into the State, or employ or harbor them therein."

Oregon, however, prohibited slavery and was to come in as a free State. She was not required, as Missouri was, to make any renunciation under this clause. Mr. Seward, at that time the leader of the anti-slavery party in the Senate of the United States, though objecting to this clause as harsh, failed to see in it any infraction of the Constitution of the United States, or deprivation of the rights of citizens, and stated he would vote for the admission of the State, which he did.[1]

Mr. Fessenden, of Maine, objected to admission on account of this provision, but Judge Trumbull, Republican Senator from Illinois, stated that while he could not vote for the admission of Oregon, it was not for the reason assigned by Mr. Fessenden. He said: "I by no means assent to the doctrine that Negroes are required by the Constitution of the United States to be placed on an equal footing in the States with the white citizens."

Preston King, a Republican Senator from New York, thought the provision was harsh, but declared: "I certainly would not be in favor of encouraging the immigration of any considerable number of black men to settle and live

[1] *Congressional Globe,* 1st Session, 35th Congress, p. 1964.

among a white population. I think it is the interest of both races that we should live separate." He favored the settlement of the free blacks in Central and South America, and he was, as he stated, perfectly willing that the people of those new free States should exercise their discretion and exclude Negroes if they saw proper.[1]

The Free Soil convention of Topeka, Kansas, which framed that Constitution, submitted a similar provision of the Constitution to a separate vote of the people, and it was adopted. See speech of Mr. King [2] and speech of Mr. Douglas.[3] Yet there was no objection by anti-slavery men to the admission of Kansas on that ground. So far from that, the National Convention of the Republican party held in 1860 nominated Mr. Lincoln with his well-known views on that subject, and demanded the immediate admission of Kansas. It will be seen hereafter that Mr. Lincoln, when President, concurred fully in the views of Mr. King, and favored separation of the races by colonization of free Negroes in South America. See his message, December, 1862.

[1] *Congressional Globe,* 1st Session, 35th Congress, p. 2207.
[2] *Ibid.,* p. 2207.
[3] *Ibid.,* p. 1965.

CHAPTER VI

THE ANNEXATION OF TEXAS

The next occasion for any considerable sectional controversy grew out of the proposed annexation of Texas.

It is certain that the main purpose of the South in the advocacy of that measure was to secure an addition to the waning power of that section. See speech of Mr. Marsh, of Vermont.[1]

That the opposition of the North to that measure was to prevent that increase, and on account of the three-fifths representation of slaves, is also clear. It is only necessary to cite the resolution of the Legislature of Massachusetts on that subject and a few other authorities. These resolutions denied the constitutional power of Congress to annex Texas, and claimed that it was a power reserved to the people.

The fourth resolution was as follows: "That the people of Massachusetts will never consent to use the powers reserved to themselves to admit Texas, or any other State or Territory, now without the Union, on any other basis than the perfect equality of freemen; and that while slavery or slave representation forms any part of the claims or conditions of admission, Texas, with their consent, can never be admitted." [2]

Mr. Dayton, of New Jersey, in opposing annexation, alluded to the three-fifths principle of Southern representation, which weighed five slaves against three freemen, and said his voice would never be given for extending that principle beyond the Sabine.[3]

The resolutions of the State of Connecticut presented to the House of Representatives December 15, 1845, denied,

[1] Appendix to the *Congressional Globe*, 2d Session, 28th Congress, p. 314.

[2] *Congressional Globe*, 2d Session, 28th Congress, p. 299.

[3] *Ibid.*, p. 333.

like those of Massachusetts, the power of Congress to admit new States, not formed in the original territory of the United States. They denounced the annexation of a large slave-holding territory with the declared intention of giving strength to slavery as a deliberate assault upon the compromises of the Constitution. They also denounced the action of their Senator, J. M. Niles, in voting for the resolution of annexation, which provided for the extension and perpetuation of human slavery and added to its already predominating influence in the National Councils.[1]

Caleb B. Smith, of Indiana, said in debate in the House that the Northern people "will resent any attempt to extend or perpetuate slavery, or to increase the relative political power of those who have an immediate interest in it."

Mr. Winthrop, of Massachusetts, said that he opposed annexation because it was unconstitutional, and "because I believe it will break up the *balance of our system, violate the compromise* of the Constitution, and endanger the permanence of the Union; and above all, because I am opposed to the extension of slavery or the addition of another inch of slave territory to the Nation."

Texas was admitted, with a proviso that it might thereafter be divided into five States, and that slavery should be excluded north of 36° 30′.

THE WILMOT PROVISO DURING THE WAR WITH MEXICO

The next great controversy on the subject grew out of the proviso offered by Mr. Wilmot, of Pennsylvania, to a bill appropriating money to enable the President to conclude a peace with Mexico. The proviso was first offered on the 8th day of August, 1846. The session was near the end, and there was but little discussion on it. It was adopted in the House by a vote of eighty-three to sixty-four. Stephen A. Douglas, Ficklin, Hogan, and McClernand, of Illinois; Harper and Vinton, of Ohio; Ewing and Ramsey, of Pennsylvania; Wright, of New Jersey, and Rockwell, of Connecticut, were the only Northern men who voted against the proviso.

On the 10th of August the matter came up in the Senate.

[1] Appendix to the *Congressional Globe,* 1st Session, 29th Congress, p. 59.

This was the last day of the session as previously fixed by a concurrent resolution of adjournment.

Mr. Davis, of Massachusetts, took the floor and occupied it until the hour of adjournment, whereby the bill to which the proviso was attached was defeated. He was asked to give way for action to be taken prolonging the session. This he declined. He opposed the bill and favored the proviso. He opposed the acquisition of slave territory. He said: "The acquisition of territory on our Southern limits redounded to their" (Southern friends, as he called them) "benefit altogether. The newly acquired territory ranged itself under their banner. . . . And while contemplating the acquisition of territory extensive enough to furnish ten more States, I would like to know if their interest alone is to be consulted? If California is to be annexed, that vast region comprehending one-third at least of the Mexican Republic, with institutions assimilating themselves to those of the Southern States of this Union, I say it seems to me to be a matter which well deserves the attention of the free States, in order that the equipoise of power may not *be completely subverted and made to incline* in favor of their Southern friends." [1]

Here again, in the first speech made in Congress in favor of this celebrated proviso, it was announced that opposition to the bill was grounded on the fact that it increased the political weight of the South in the National Councils.

Mr. Wilmot on February 1, 1847,—war being still flagrant, before the great victory of the American arms at Buena Vista, and before Scott had commenced his march from Vera Cruz to the City of Mexico,—again offered his proviso to a bill appropriating three millions of dollars to enable the President to conclude a peace with Mexico. After a great deal of acrimonious discussion, the Senate bill, without the proviso, was passed in the House. Yeas, one hundred and fifteen; nays, eighty-one.[2]

Peace was made and territory acquired without any laws being enacted with a provision prohibiting slavery in the acquired domain.

Before any territorial government was formed for California she applied under a non-slaveholding Constitution for

[1] *Congressional Globe,* 1st Session, 29th Congress, p. 1221.
[2] *Congressional Globe,* 2d Session, 29th Congress, p. 573.

admission into the Union as a State. There had been no previous enabling Act, no civil government even. She was under military rule when her Constitution was formed. At the same time there were pending questions concerning the boundary of Texas, the formation of a civil government for New Mexico, and also for Utah, and for the passage of a more effective law for the delivery of fugitive slaves.

Mr. Clay, after a long retirement from public life, returned to the Senate to aid in settling these serious questions. The wish of the North was to place Congressional interdiction of slavery on the new Territories. The Senate resisted and proposed the running of the Missouri compromise line of 36° 30′ to the Pacific. This was rejected. Bills for these Territories were then formed upon the principles of non-intervention as to slavery in the territory, and so finally passed. The debate on the subject of slavery was long and bitter. The South resisted the admission of California under a non-slaveholding Constitution. It was complained that the admission of the State was wholly irregular; that the military commander had aided in forming the convention that framed the Constitution. The South could not, without reluctance and chagrin, see the splendid territory acquired through Southern policies, and in a very large degree by Southern valor, wrested from that section and added to the already preponderating influence and power of the North. The reluctance was greater since the spirit of sectionalism had grown more and more bitter, and the danger was imminent that the ultimate aim of the North would be accomplished,—that is, the destruction of slavery in the states.

So the South, or a large portion of it, resisted the admission of California upon grounds of irregularities in forming the Constitution,—upon grounds that had been waived in the case of Texas. The North, seeing the opportunity of adding a great State to the already overwhelming preponderance of that section, forgot the constitutional objection that from 1803 down to that time it had maintained,—that no power existed in Congress to admit new States from territory acquired since the formation of the Constitution. As late as 1845, as we have seen, the doctrine had been maintained in full force by great northern statesmen, and sanctioned by solemn resolutions of state Legislatures.

So the North, with absolute unanimity, favored the immediate admission of California; fifty-six Southern Representatives voted against it. These inconsistencies came from the same old enduring cause,—a contest for sectional political power. Both sides recognized the truth of the declaration made by Mr. Quincy in opposing the admission of Louisiana in 1811, "that when the weight of particular sections of a confederacy was greatly unequal, the resulting power would be abused, and that it was not in the nature of man to exercise it with moderation." The South felt this keenly, being the weaker party, and cherishing domestic institutions to which the North was bitterly hostile. Shall it be added that the North felt and acknowledged its truth and had determined to secure the greatly preponderant power, and to use it in its own discretion, without reference to the interests or wishes of the South? It is certain that the South thought so.

Reading over these proceedings now, after the lapse of forty years,[1] we will be struck with the passion and heat of the debates. There seemed to be insanity on both sides with reference to the Territories. Whether slavery should be excluded from them by Congressional action was of no practical importance,—a mere question of prejudice on one side and of pride on the other. But the voice of reason, if not silent, was at least drowned by passion.

Mr. Webster, in his great speech, March 7, 1850,[2] demonstrated that slavery could not go into the Territories acquired from Mexico: "That it (slavery) was excluded by the law of nature, the law of physical geography, the law of the formation of the earth, a law that with a strength beyond all laws of human enactment settled the question forever."

Speaking of the Wilmot proviso, he declared that "such a proviso would be idle as respects any effect it would have upon the Territory, and I would not take the pains uselessly to reaffirm an ordinance of nature, nor to reenact the will of God. I would put in no Wilmot proviso, for the mere purpose of a taunt and of a reproach." Yet for a mere taunt and a reproach the North was eager to put in the form of law the Wilmot proviso. Mr. Webster lost caste and popularity in his own State for his action, and Southern men who acted

[1] Written about 1891 or 1892.

[2] Webster's Works, Vol. 5, p. 324 *et seq.*

with him likewise lost position in their States. The result of the agitation was that the great compromise of 1850 was made. California was admitted, the Texas boundary adjusted, and territorial governments for Utah and New Mexico framed on the principle of non-intervention by Congress in reference to slavery. The sectional storm was hushed. But the silence and peace were deceptive. They were not the results of public acquiescence and satisfaction. It was that condition of quiet which is devoted to preparation for a renewal of the conflict about to take place.

The second session of the thirty-first Congress met December 2, 1850. The President (Fillmore) in his message had spoken of his duty to enforce the laws, including the fugitive slave law.

On the seventh day of the session Mr. Giddings assailed the President and that portion of his message with vigor and bitterness. He said that if a fugitive slave were returned, all knew he would be sent to a sugar plantation where he could not live five years, or to a cotton plantation where he could not live seven. This incredible statement was eagerly accepted by the people of the North, notwithstanding that if it had been true, slavery before that time would have been abolished by the inhuman action of the slaveholders themselves.

Mr. Giddings further said: "The men of the North, who look upon this as murder, would as soon turn out and cut the throats of the defenseless Negro as to send him back to a land of chains and whips. . . . The man who should assist in the capture of a fugitive would be regarded by us as guilty as he under whose lash the victim expires." He thought that the capture of a fugitive slave to send him to the South to die under a torture of five years was worse than ordinary murder. Referring to Dr. Webster, the murderer of Dr. Parkman, and to the great statesman, Daniel Webster, Mr. Giddings said: "During last summer two distinguished gentlemen of the same name occupied much of the public attention. One was said to have committed murder, and the other to have procured the passage of this [fugitive slave] law. One was hanged for his crime; the other, for his efforts, taken to the Executive Cabinet. One destroyed the life of an individual; the other contributed his efforts for the passage of this law,

which must consign hundreds, perhaps thousands, to premature graves. I, sir, cannot speak for others; but for myself I would rather meet my final Judge with the guilt of him who has gone to his final account than of him who now sits in yonder Cabinet."

Proceeding to discuss union and disunion, he said: "Well, sir, I do not say that Northern men have lost all love and regard for the Union. But one thing is certain, that they do not feel that reverence for it which once was so prevalent among us. They feel, sir, less attachment to it than formerly. They now speak of dissolution without hesitation. And if the Union be exerted for their degradation, by subjecting them to the provisions of this fugitive law, they would greatly prefer to see it dissolved. On this subject I feel no compunctions.

"More than eight years since, with twenty (20) other members of this body, I addressed the people of the free States, foretelling this state of things."

Mr. Giddings then proceeded to quote from this address as follows: "We hesitate not to say that annexation (of Texas) effected by any act or proceeding of the Federal Government, or any of its departments, would be identical with dissolution (sic). It would be a violation of our national compact, its objects and designs, and the great elementary principles which entered into its formation, of a character so deep and fundamental, and would be an attempt to eternize an institution and a power so unjust in themselves, so injurious to the interests and abhorrent to the feelings of the people of the free States as, in our opinion, not only inevitably to result in a dissolution of the Union, but fully to justify it. And we not only assert that the people of the free States ought not to submit to it, but we say with confidence, they will not submit to it." [1] Mr. Giddings stated that ex-President John Quincy Adams was one of the signers of this paper.

About this time we begin to hear first of a law binding the political action of the American people that is higher than the Constitution. Hitherto, so far as we have observed, the assailants of the South preferred to act in professed obedience to that instrument. Their actions, however con-

[1] *Congressional Globe,* 2d Session, 31st Congress, pp. 15, 16.

trary to that instrument, they believed, or professed to believe, were in obedience to it and in many instances, as was claimed, were demanded by its terms. As the first instance of the higher law we have noted in the proceedings of Congress we call attention to a petition for the repeal of the fugitive slave law that was sent to Congress by the Quakers of Indiana, who based their action on the assertion that "there is a higher law than any human enactment."

On a motion to receive this petition with a view to referring it to the Judiciary Committee with instructions to report a bill repealing the fugitive slave law, there were sixty-eight votes in the affirmative.

ORGANIZATION OF TERRITORIAL GOVERNMENTS IN KANSAS AND NEBRASKA

In the thirty-third Congress, 1853-5, came up the organization of territorial governments in Kansas and Nebraska. The Committee on Territories in the Senate, through Mr. Douglas, their chairman, undertook to make the legislation on the subject of slavery conform to the principle of non-intervention recognized in the compromise of 1850. The principle seems to have received the endorsement of the country in the Presidential election of 1852. General Pierce, the candidate of the Democratic party, was understood to stand upon that compromise as a finality. General Scott, the Whig candidate, was supposed to be doubtful on that subject. But both parties in their national platforms had declared that compromise was to be adhered to in principle and in substance. The result was an overwhelming victory for Pierce, he receiving two hundred and fifty-four electoral votes to Scott's forty-two, and carrying all the states except Vermont, Massachusetts, Tennessee, and Kentucky.[1]

The bill for territorial governments in Kansas and Nebraska declared the eighth section of the Act of 1820, authorizing the people of Missouri to form a Constitution (the section prohibiting slavery north of 36° 30′), inconsistent with the principles of the compromise of 1850, and, therefore, inoperative. Immediately on the introduction of this

[1] Cooper's "American Politics," Book V, p. 7.

measure an effort, in a large degree successful, was made to renew the sectional controversy.

And here again it is to be remarked that the agitation seems to have been wholly unnecessary. These Territories, as in fact all others then belonging to the United States, by physical geography and by natural laws were unfitted for slavery. A further exclusion by Act of Congress would not have been more effective. In the language of Mr. Webster before quoted, it would have been but unnecessarily reaffirming an ordinance of God. As a matter of practical politics it seems now to have been wholly a useless agitation from which nothing ever came but sectional bitterness,—a further alienation between the people of the North and the people of the South. That the South should insist on legislation which, on its face, would be equal and fair, and would give to her citizens an equal legal opportunity of settling in these Territories, was the result of a mere sentiment,—a sentiment, however, likely to prevail among a spirited and free people, jealous of their rights and liberties. That the North should insist on legislative exclusion, if not intended as a "taunt and a reproach," to quote Mr. Webster, was wholly unnecessary. But both sides were excited. The long and bitter controversy on the subject had left traces in the passions and feelings of men that seemed ineradicable.

In the minds of many Northern men this so-called Missouri compromise suddenly acquired sanctity instead of the reprobation formerly attached to it. In the minds of many Southern men there came a strange delusion born of hope and fear,—the apprehension of danger to their domestic institutions and the vain hope of preserving them. The hope was that it was possible to extend slavery into these Territories, and thus furnish an additional defense to assaults now plainly intended. Here again the debates show that the controversy grew out of the same old cause,—the desire for political power on both sides.

Mr. Seward, in his speech delivered in the Senate on February 17th, 1854, showed that this was the groundwork of the controversy. He said: "A rivalry for political ascendency was soon developed; and, besides the motives of interest and philanthropy . . . . there was now on each side a desire to increase, from among the candidates for admission

into the Union, the number of States in their respective classes,"—as slaveholding or non-slaveholding,—"and so their relative weight and influence in the Federal Councils."

Mr. Seward, proceeding from this exposition of the views and aspirations of both parties to express himself as to the apprehended course of the South, said: "But I am well assured also, on the other hand, that if ever the slaveholding States shall multiply themselves and extend their sphere so that they could, without association with the non-slaveholding States, constitute of themselves a commercial republic, from that day their rule through the Executive, Judicial, and Legislative powers of this Government will be such as will be hard for the non-slaveholding States to bear; and their pride and ambition, since they are congregations of men, and are moved by human passions, will consent to no union in which they shall not so rule." [1]

Like apprehensions were manifested by Southern men as to Northern supremacy. Let history answer whether their apprehensions have been realized!

[1] Appendix to the *Congressional Globe*, 33d Congress, 1st Session, p. 150.

CHAPTER VII

WAS THE MISSOURI COMPROMISE VIOLATED BY THE SOUTH?

At this point it is proper to inquire as to the truth of the alleged violation of faith by the South.

As has been stated, the opposition to the non-intervention provisos of the Kansas and Nebraska bill relied greatly on the Missouri compromise. They charged that the bill was a breach of faith, a violation of a solemn compromise between two sections. The speech of Mr. Seward, which was made in opposition to the bill, and from which quotations have been made, had for its motto on the title page, "Freedom and Public Faith."

Whoever shall desire to understand this matter fully should read carefully the great speech of Mr. Douglas delivered in the Senate on the 4th day of March, 1854.[1] We have space only to notice a few salient points in this great speech.

Mr. Douglas showed that under the alleged compromise of 1820, in which slavery was prohibited north of 36° 30′, Missouri was never admitted into the Union; that the North, after having obtained the enactment of that prohibition, refused to admit her as a State on the ground hereinbefore stated, that is, that the first alleged compromise was expressly repudiated by the North in the vote on Mr. Mallory's amendment requiring the State to abolish slavery in her Constitution; that on this the North, by a vote of 61 to 33, nearly two to one, refused admission to Missouri on the terms of the alleged compromise; that a new compromise, gotten up under the auspices of Mr. Clay, was found necessary; that under this the admission was secured; that the State of New York, after the passage of the alleged compromise of 1820, renewed

[1] Appendix to the *Congressional Globe*, 1st Session, 33d Congress, p. 325 *et seq.*

the resolution of instructions to her Senators to vote against the admission of Missouri, and that those former resolutions instructed her Senators to oppose admission as a State into the Union of slave territory not confined within the original boundaries of the United States, without making the prohibition of slavery therein an indispensable condition of admission.[1]

He also showed that in 1848 he proposed the compromise line of 36° 30′ to the Oregon bill, and it was voted down in the House; that in 1850 a proposition was made to make 36° 30′ the southern boundary of Utah, with no reference to slavery, however; but that John P. Hale, the leader of the Free Soilers in the Senate, opposed it in these words: "I wish to say a word why I shall vote against the amendment. I shall vote against 36° 30′ because I think there is an implication in it. I will vote for 37° or 36° either, just as it is convenient, but it is idle to shut our eyes to the fact that here is an attempt in the bill—I will not say it is the intention of the mover—to pledge the Senate and Congress to the imaginary line of 36° 30′ because there are some historical recollections connected with it in regard to this controversy about slavery. I will content myself with saying that I never will, by vote or speech, admit or submit to anything that may bind the action of our legislation here to make the parallel of 36° 30′, the boundary line between slave and free territory."

Mr. Douglas also showed that in 1836, when Arkansas applied for admission into the Union, it was opposed by Northern men, forty-nine of them voting against admission; that one of them, Mr. Hand, of New York, said: "I am aware it will be, as it has already been, contended that by the Missouri compromise, as it has been preposterously termed, Congress has parted with its right to prohibit the introduction of slavery into the territory south of 36° 30′ north latitude. There are, in my mind, insuperable objections to the soundness of that proposition. In the first place, there was no compromise or compact whereby Congress surrendered any power, or yielded any jurisdiction; and in the second place, if it had done so, it was a mere legislative act,

[1] Appendix to the *Congressional* Globe, 1st Session, 33d Congress, p. 325 *et seq.*

that could not bind their successors; it would be subject to a repeal at the will of any succeeding Congress." [1]

Mr. Douglas contrasted the resolutions of New York, hereinbefore noted, as opposing the admission of Missouri, with resolutions of the same State in which the Act of 1820 was called a compromise, and which denounced the Kansas-Nebraska bill as in derogation of truth, a gross violation of plighted faith, and an outrage and an indignity upon the free States.

The bill passed. In 1855 there was formed the short-lived American party, yet the agitation of the slavery question still continued. The Republican party was formed. There was trouble and bitter controversy about the admission of Kansas.

THE PRESIDENTIAL ELECTION OF 1856

There were three parties in the Presidential election of 1856—the Democratic, the Whig, or American, and the newly formed Republican party. The Republican Convention met in pursuance of a call on all those who were opposed to a repeal of the Missouri compromise and the policy of extending slavery in the Territories, and who favored the admission of Kansas as a free State and restoring the action of the Federal Government to the principles of Washington and Jefferson.

The Republican party was exclusively a Northern party, and it illustrates the selfishness of human nature, as well as the lust for political power and sectional supremacy, that the people of the Northern States should so soon have forgotten the principles to which they had adhered for nearly the whole life of the republic,—denying the power of Congress to admit new States from territory acquired since the adoption of the Constitution,—and that the convention should demand the immediate admission of Kansas under her free State Constitution. In 1811 the admission of Louisiana, being a part of the territory acquired from France, was deemed sufficient to dissolve the Union because it was unwarranted by the Constitution and a violation of the compromises of that compact.

[1] Appendix to the *Congressional Globe,* 1st Session, 33d Congress, p. 335.

In 1814 the same opposition on constitutional grounds to the admission of States from territory not originally owned by the United States was manifested. In 1820 and 1821 the admission of Missouri was opposed on the same grounds. In 1845 the same principles were urged in opposition to the annexation of Texas. Now, however, the immediate admission of Kansas,—adjoining Missouri, and formed of territory acquired as Missouri was, as a part of the Louisiana Purchase, —was demanded in a party platform and made even one of the elements of the formation of a sectional party in that section of the Union that had all along denounced as unconstitutional the admission of States acquired as Kansas was. It is not intended by what has been said to cast the reproach of a wilful violation of principles long entertained on those who thus changed position. The inconsistency is noted in order to make more clear the great truth that from the beginning the lust of power was the mainspring of the agitation of the slavery question, though motives of philanthropy were intermingled to an extent that gave force, persistency, and an extra zeal to the agitators.

The Democratic party placed itself on non-intervention as to slavery as recognized in the compromise of 1850, which they asserted had been confirmed by both the Democratic and Whig parties and ratified by the people in the Presidential election of 1852.

As to Kansas, the declaration was of the right of the people of the Territories, whenever the number of the inhabitants justified it, to form a Constitution admitting or excluding slavery, and to be admitted on terms of perfect equality with the other States.

The Whig platform denounced both the Republican and the Democratic parties as sectional, claiming that the former represented only the Northern States and that the latter "appealed mainly to the passions and prejudices of the Southern States."

Buchanan, the Democratic nominee, received 174 electoral votes, 1,838,169 popular votes, and carried 19 States. Fremont, the Republican nominee, received 114 electoral votes, 1,341,264 popular votes, and carried eleven states, all Northern. Fillmore, the Whig and American nominee, received 8 electoral votes, 874,534 popular votes, and carried

one state,—Maryland.[1] The Northern States voting for Buchanan were Pennsylvania, New Jersey, Indiana, Illinois, Iowa, Wisconsin, and California.[2]

Buchanan received 496,905 votes more than Fremont, and 377,629 less than Fillmore and Fremont together. Still the popular vote in the North for Fremont exceeded that of Buchanan, and the result was a Pyrrhic victory for the Democrats. The lesson of the election was that a party organized solely on the ground of opposition to the institutions of the South had in its first race carried a majority of the Northern States, and had received the votes of a majority of the Northern people, whilst the Democrats had carried every Southern State except one, and that had been cast for the conservative, Mr. Fillmore. Here indeed was the "geographical line, coinciding with a marked principle, moral and political," which, Mr. Jefferson thought, when "once conceived and held up to the angry passions of men will never be obliterated, and every new irritation will mark it deeper and deeper." [3] That great statesman regarded such a line of division of parties as the knell of the Union, and "like a fire-bell at night, it had awakened and filled him with terror." [4] These words were spoken with reference to the agitation of the slavery question on the admission of Missouri.

If true then—and who can doubt that they were?—with how much force they must have struck the thoughtful men of 1856. The question, as Mr. Jefferson said, had been hushed for the moment, but this was a reprieve only, not a final sentence.

THE DRED SCOTT CASE

The South saw the deep significance of the situation, and was profoundly impressed with the impending danger. Yet some hope came within a few months from an unexpected quarter. The Supreme Court made its decision in the celebrated Dred Scott case.[5] The South had long maintained

[1] Cooper's "American Politics," Book V, p. 7.
[2] *Ibid.*
[3] Letter to John Holmes, "Jefferson Memoirs," Vol. IV, p. 323, and Randall's "Life of Jefferson," Vol. III, p. 456.
[4] *Ibid.*
[5] 19 Howard's Reports.

that the Federal Government (through any of its organs) was not the final judge of the extent of its own powers. This view was put forth in the Virginia and Kentucky resolutions of 1798-9. On the contrary, the Northern States, which answered these resolutions, took the position that the Supreme Court was the final arbiter. The South, however, did not hold,—and, so far as I know, no eminent Southern statesman had ever held,—to the position that the Federal Government itself was not bound to abstain from the exercise of a power that the Supreme Court held did not belong to it. The South was willing that the Supreme Court decision should bind the Federal Government in the denial of a power, though it should not bind the States in affirming a power that the States alleged did not exist. The theory of the North, however, was, in the main, that the Supreme Court was the final judge.

This celebrated decision held two points of immense interest to the South.

1. That Congress had no power to prohibit slavery in the Territories.

2. That persons of African descent, whose ancestors had been imported into the United States as slaves, were not citizens.

The decision did not settle these questions in the minds of the politicians. It but added fuel to the flame of sectional excitement. It was denounced everywhere in the North. Its binding effect on Congress was denied. It was admitted only that it bound the parties to the suit on the mere question of right to the thing in dispute between them in that very case. This was the view of Mr. Lincoln. So far as I have observed, this is the first instance in which it was seriously maintained by any political party or by any considerable number of statesmen that Congress could rightfully exercise a power denied to it by the Supreme Court; though there are instances in which careful and conservative statesmen considered that, even on constitutional grounds, it was right to decline to exercise a power conceded by the Supreme Court to be constitutional. If Congress should exercise the power to abolish or prohibit slavery in a territory, it is evident that in every case involving the freedom of a slave under that law the Supreme Court, whilst holding the views announced in

the Dred Scott case, would decide that freedom was not conferred, and hence the only effect of such a law would be to involve in an interminable litigation parties asserting a right to slaves.

RE-ORGANIZATION OF THE SUPREME COURT

This view was not unobserved by the statesmen of the North who determined to exercise the power, notwithstanding the decision of the Supreme Court denying it. Mr. Seward, at an early day after the decision, gave notice of a bill to reorganize the Supreme and Circuit Courts of the United States in such a way as to equalize the representation of the several States in the courts as far as possible according to their Federal population, and to secure greater facility and despatch of business.[1]

What Mr. Seward meant by this bill, to secure representation of the States in the Supreme Court according to the Federal population, is not difficult to divine. In the first place, the majority of the judges were to be from the North, and what he expected from the Northern judges is plainly inferable from what he said in his speech of March 3, 1858, on the subject of the decision in the Dred Scott case. He represented that after Mr. Buchanan's election, but before he came into office, "he approached or was approached by the Supreme Court of the United States"; that "the Court did not hesitate to please the incoming President by seizing this extraneous and idle forensic discussion [of the Dred Scott case] and converting it into an occasion for pronouncing an opinion that the Missouri prohibition was void; and that, by force of the Constitution slavery existed . . . . in all the Territories of the United States, paramount to any popular sovereignty within the Territories, and even to the authority of Congress itself." He described the appearances of the judges at the inauguration in their robes, "which yet exacted public reverence." He said, "The people, unaware of the import of the whisperings carried on between the President and the Chief Justice, and imbued with reverence for both,

[1] Appendix to the *Congressional Globe*, 1st Session, 35th Congress, p. 77.

filled the avenues and gardens far away as the eye could reach." [1]

The Chief Justice alluded to was the venerable Taney, and the court itself, thus ridiculed and denounced, was no less illustrious for the character and abilities of its members than it had been in any former period of its history. Mr. Seward was then the acknowledged leader of the Republican party. In learning, genius, and political skill he was without a peer. In influence in shaping and directing the policies of the party and public opinion in the North, he was without a rival.[2]

[1] *Congressional Globe,* 1st Session, 35th Congress, p. 941.

[2] It appears, however, from the correspondence of President Buchanan, that there had been an interchange of letters between himself and two members of the Supreme Court, Mr. Justice Catron and Mr. Justice Grier (to which correspondence Chief Justice Taney was confessedly privy), relative to the Dred Scott case, a few weeks prior to its formal announcement by the Supreme Court, which was made shortly after the inauguration of Mr. Buchanan, on March 4, 1857. See "The Works of James Buchanan," collected and edited by John Bassett Moore, Vol. X (1910), pp. 106-108.

AUSTIN BAXTER KEEP.

CHAPTER VIII

LINCOLN AND THE DOUGLAS DEBATE

In this same year, 1858, came on the great contest between Mr. Douglas and Mr. Lincoln for the United States Senatorship from Illinois. This was signalized by the ability and high character of the contestants and the importance of the questions involved. These questions related alone to slavery and to the status of the free Negro. Mr. Lincoln denounced the Dred Scott decision, claiming that it had no binding force except between the parties to it, and he avowed his opinion that slavery should be prohibited in the Territories, that decision to the contrary notwithstanding. He manifested also a deep opposition to slavery everywhere, though renouncing all intention to interfere with it in the States by direct Congressional action. He also avowed his wish to have the free Negroes colonized; and declared his firm opposition to all claims set up for the Negro for social and political equality. He avowed that there was a physical difference between the two races that would forever forbid such equality, and he affirmed that, inasmuch as it was certain that the two races could not live together on terms of equality, he was for assigning the superior place to the whites.

In his speech at Springfield in 1858 Mr. Lincoln said: "Under the operation of this policy [non-intervention] that agitation not only has not ceased but is continually augmented. In my opinion it will not cease till a crisis shall have been reached and passed. A house divided against itself cannot stand. I believe this government cannot endure permanently half slave and half free. I do not expect the government to fall, but I do expect it will cease to be divided. It will become all one thing or all the other. Either the opponents of slavery will arrest the future spread of it, and place it where the public mind shall rest in the belief that it

is in the course of ultimate extinction, or its advocates will push it forward till it shall become alike lawful in all the States, old as well as new, North as well as South."

THE IRREPRESSIBLE CONFLICT
ADVANCE IN ANTI-SLAVERY VIEWS

This quotation from Mr. Lincoln, with other evidences hereafter to be introduced, shows the advanced position that was now being taken by the North. In the beginning the slavery question had been debated more as a question of political power. The moral aspect, though often presented, was subordinated to the other. It had all along, up to this time, been discussed on the concession that it was not to be interfered with in the States. In the Federal Convention, which framed the Constitution, Mr. Ellsworth said: "The morality and wisdom of slavery are considerations for the States themselves. . . . The old Confederation did not meddle with this point [the importation of slaves], and I do not see any greater necessity for bringing it within the policy of the Union. . . . The States are the best judges of their particular interests. . . . Let us not intermeddle."

Mr. Gerry said: "We have nothing to do with the conduct of the States as to slaves, but ought to be careful not to give any sanction to it [the slave trade]." In the controversies afterward as to Louisiana, Missouri, and Texas, and as to slave extension in the Territories, it was all along conceded that slavery was a State matter exclusively, nor was it intimated that there was such an incongruity between the institutions of the States as to render their confederation impossible, or that such an incongruity must be removed.

Now, however, the pretensions of the anti-slavery men had been advanced. Whilst admitting the want of power to interfere with it in the States, it was affirmed that its existence in some States constituted a "division of the house," which therefore could not stand; and it was declared that the agitation would go on until the public mind should rest in the conviction that slavery was in the course of ultimate extinction, or until slavery should be established in the Northern States. The Northern people were thus educated to believe that slavery was a national and not a State matter,

and if they would prevent its introduction among themselves, they must destroy it in the South; and as no one pretended that slavery should be extended to the North, the argument in effect was that it must be destroyed in the South.

About this same time,—October, 1858,—Mr. Seward expressed the same idea with great emphasis in his speech at Rochester in the following language:

"Free labor and slave labor,—these antagonistic systems,—are continually coming into close contact, and collision results. Shall I tell you what this collision means? They who think it is accidental, unnecessary, the work of interested or fanatical agitators, and therefore ephemeral, mistake the case altogether. It is an irrepressible conflict between opposing and enduring forces; and it means that the United States must and will, sooner or later, become either entirely a slaveholding nation or entirely a free labor nation. Either the cotton and rice fields of South Carolina and the sugar plantations of Louisiana will ultimately be tilled by free labor, and Charleston and New Orleans become marts for legitimate merchandise alone, or else the rye fields and wheat fields of Massachusetts and New York must again be surrendered by their farmers to slave culture and to the production of slaves, and Boston and New York become once more markets for trade in the bodies and souls of men." [1]

SLAVERY IN THE 36TH CONGRESS

The election for the Thirty-sixth Congress had put the Democratic party in a minority in the House, though the Republicans did not have an assured majority. The latter nominated Mr. Sherman [afterwards Senator] for Speaker. He never polled higher than one hundred and ten votes out of the one hundred and seventeen necessary for a choice. The contest for Speaker was long and bitter, extending to forty-four ballots, and over a period of about sixty days. On February 1st, Mr. Pennington, of New Jersey, was elected. During the pendency of the election the debate in the House, which related entirely to the slavery question, was acrimonious and sectional beyond all former precedent. Mr. Sherman was charged with signing a recommendation of a

[1] *Congressional Globe,* 1st Session, 36th Congress, p. 195.

book called "The Impending Crisis," by Hinton R. Helper, of North Carolina. The book was intensely and bitterly sectional and anti-slavery. Extracts from it were read and commented on in the debate, and it was claimed that the book incited servile war and bloodshed. Adopting language for the non-slaveholders of the South to the slaveholder, the book reads: "Henceforth, sirs, we are demandants, not suppliants; we demand our rights, nothing more nor less. It is for you to decide whether we are to have justice peaceably or by violence, or, whatever consequences may follow, we are determined to have it one way or the other."

From other extracts read in the debate it appears that the book recommended a thorough organization of non-slaveholders in the South on the following basis, among other things of like character:

1. Never to vote for any one for office who advocates the retention or perpetuation of slavery.

2. No cooperation with pro-slavery politicians, no fellowship with them in religion, no affiliation with them in society.

3. No patronage to pro-slavery merchants, lawyers, or editors, or hotels using slave waiters; and no hearing of pro-slavery preachers.[1]

The book had been endorsed by seventy Republican members of Congress.

[1] *Congressional Globe,* 1st Session, 36th Congress, pp. 16-17.

CHAPTER IX

JOHN BROWN'S INVASION OF VIRGINIA

THE invasion of Virginia by John Brown, which had occurred but a few months before the meeting of Congress, was also the subject of bitter crimination and recrimination. It was charged by the Southern Members that this invasion was the direct result of the teachings by the Republican party of the "irrepressible conflict" views announced by their leaders. This was denied by the Republicans and the invasion was condemned. Nevertheless, many expressions of Northern men and the proceedings of several meetings and conventions held in the North were quoted to show that the invasion met with the approval of many persons in that section.

Mr. English, of Indiana, caused to be read proceedings of the meeting held in Chicago, in which sympathy for John Brown was expressed, the fugitive slave law denounced, and the doctrine that men are bound to obey civil enactments that in their judgment obviously contravene the requirements of the laws of God was condemned. Of this character it was resolved was the fugitive slave law, and that "obedience to it would be treason to God and man." Compromise with slaveholders was severely condemned, and the invasion at Harper's Ferry was apologized for on the ground that "oppression maketh even a wise man mad," and that it was no matter of surprise that the slaves and sometimes those who remembered them in bonds, as bound with them, should be driven to rash resistance and revenge; that they deplored (not condemned) the rising, and that they would prevent a repetition of it by concentrating the benevolent efforts of all good men upon the use of moral and peaceful means for the abolition of slavery. A speaker eulogized Brown as a man of God with courage like Leonidas at Thermopylæ. And others declared in favor of shooting slaveholders.[1]

General Logan presented and caused to be read the pro-

[1] *Congressional Globe,* 1st Session, 36th Congress, p. 231.

ceedings of a meeting at Aurora, Illinois, breathing this same spirit.[1]

Mr. Smith, of Virginia, read an editorial from the New York *Evening Post,* then as now one of the ablest and most influential papers in the Union, in which it spoke of the popular feeling manifested at the North on account of the execution of Brown, as proving the wisdom of his own remark that he "could in no way so well serve the cause of abolition as by being hung for it." The paper also alluded to the manifestations in that section of respect for Brown's name and memory,—"the devotion of the hour of his death to prayer in a great number of churches, the tolling of bells in many towns, the firing of minute-guns in others." [2]

The fact was also presented that at Dover, New Hampshire, in a Unitarian church the minister declared: "If an honest expression of the wishes of the North could be taken to-morrow, John Brown would be the people's candidate for the next Presidency, and he would receive a million votes;" and, "The gallows from which he ascends into Heaven will be in our politics what the cross is in our religion." [3] In a Baptist church in Boston a meeting of sympathy for Brown was held, at which over two thousand were present, and prayer was offered for Brown; and in a meeting at the Old South church the minister declared that Brown was an instrument in the hands of Providence, and God had used him "as His sword to inflict a wound on the slave power."

Mr. Smith read from Wendell Phillips: "Every human being is bound to judge the righteousness of a law before he obeys it," and that "John Brown had a right to judge of the slave laws of Virginia on this account;" and from Mr. Cheever: "Under the Constitution of the United States and by the word of God, John Brown had a perfect right to proclaim liberty to the enslaved and to labor for their deliverance. If the Constitution had forbidden him to do this, while the word of God commanded him, then he would have been bound to obey the word of God, anything in the Constitution to the contrary notwithstanding." [4]

[1] *Congressional Globe,* 1st Session, 36th Congress, p. 233.
[2] *Ibid.,* p. 263.
[3] *Ibid.,* p. 263.
[4] *Ibid.,* p. 263.

Mr. Vallandigham presented a circular that he said had been extensively circulated throughout the Northern, Western, and Southern States,—a circular that contained a plan of an association to be formed in the North and West for carrying on hostilities against the South.

The circular declared:

"It is the duty of the non-slaveholders of this country, in their private capacity as individuals, without asking permission or awaiting the movements of the Government, to go to the rescue of the slaves from the hands of their oppressors."

It recommended the forming of associations throughout the country for the purpose of raising money, for procuring military equipments, forming and disciplining military companies, detaching the non-slaveholders in the South from the slaveholders, for "informing the slaves [through emissaries] of the plan of emancipation, that they may be prepared to co-operate"; and after sufficient preparation "then to land military forces (at numerous points at the same time) in the South, who shall raise the standard of freedom, and call to it the slaves and such free persons as might be willing to join" in the movement.

The circular concludes: "Our plan then is—To make war (openly or secretly, as circumstances may dictate) upon the property of the slaveholders and their abettors,—not for its destruction, if that can easily be avoided, but to convert it to the use of the slaves. If it cannot be thus converted, then we advise its destruction. Teach the slaves to burn their masters' buildings, to kill their cattle and horses, to conceal or destroy farming utensils, to abandon labor in seed-time and harvest, and let crops perish. Make slavery unprofitable in this way if it can be done in no other.

"2. To make slaveholders objects of derision and contempt, by FLOGGING THEM whenever they shall be guilty of flogging their slaves." [1]

The Southern senators and representatives were excited and exasperated. The excitement of the Northern members was somewhat allayed by the consciousness of having at length attained that political power that enabled the North to do as it willed on all subjects, and of the fact that the

[1] *Congressional Globe,* 1st Session, 36th Congress, p. 161.

Southern power would never thereafter be strong enough either for aggression or for defense. That they contemplated an early destruction of slavery was evident from the declarations of Mr. Lincoln and Mr. Seward above quoted. They felt that such abolition would not harmfully affect them, since from many of the Northern States free Negroes were directly excluded by State laws, and from the most of them by the laws of climate and physical geography. They felt that serenity that comes from a knowledge that however disastrous a large free Negro population might be to the people of the South, they could,—as Mr. Lincoln said they might, in his message of December, 1862,—"in any event decide for themselves whether they would receive them," and they could resort to laws even more rigorous than those already existing, by which, as Mr. Dawes (afterward a senator) in his letter of September 26, 1856, to W. C. Neil, said, they could "disfranchise, disable, and drive out the free Negroes from their borders."

On the other hand, the Southern members felt that exasperation and excitement that came naturally from the apprehension of a momentous event then imminent, to divert which the power of the South was constantly and daily diminishing: and the more so, since they felt that the blow aimed at their section came from confederates under a Constitution that gave no power to inflict it. One of the most conservative Representatives used this language early in the debate (Lamar's speech):

"I am no disunionist *per se*. I am devoted to the Constitution of this Union, and so long as this Republic is a great tolerant Republic, throwing its loving arms around both sections of the country, I, for one, will bestow every talent God has given me for its promotion and its glory. [Applause.] Sir, if there is one idea touching merely human affairs, which gives me more of mental exultation than another, it is the conception of this grand Republic, this great union of sovereign States, holding millions of brave, resolute men in peace and order, not by brute force, not by standing armies; indeed, by no visible embodiment of law, but by the silent omnipotence of one great, grand thought,—the Constitution of the United States. [Applause.] That Constitution is the life and soul of this great Government. Put out that light, and

where is 'that Promethean heat can its light relume'? That is our platform. We stand upon it. We intend to abide by it and to maintain it, and we will submit to no persistent violation of its provisions. I do not say it for any purpose of menace, but for the purpose of defining my own position. When it is violated, persistently violated, when its spirit is no longer observed upon this floor,—I war upon your government, I am against it. I raise then the banner of secession, and I will fight under it as long as the blood flows and ebbs in my veins. [Applause.]" [1]

This speech is a fair statement of the Southern position at that time.

On the other hand, there were avowals, both in Congress and in the Northern press, to resist by force all attempts at disunion.

Mr. Smith, of Virginia, quoted in the debate an editorial in the leading political newspaper of New York, the reputed organ of Mr. Seward, the *Courier and Enquirer,* as follows:

"And the South now understands that if any portion of this great Confederacy, whether it be the East or the West, the North or the South, attempts to withdraw from the Union, it will be promptly *whipped,*—ay, *whipped* into subjection. . . . Should disunion raise its head at the South, John Brown has taught the world how much opposition from that quarter is really worth. If seventeen fanatics, led on by a madman, could hold in subjection a town containing two thousand Virginians, and keep at bay whole regiments of Virginia militia who, even under the eye of their Governor, dared not attack their invaders, but stood by and saw twelve United States Marines make the attack and capture in ten minutes, what would these same boastful soldiers do when confronted by Northern valour, banded together under the Constitution and bearing aloft the banner of the Union? Why, our seventh regiment alone, in such a cause,—the cause of the Union and the Constitution,—aided, as it would be, by the good men of the slave States, would promptly overrun every rebellious State of the South, and compel them to return to their allegiance." [2]

Mr. Hickman, of Pennsylvania, informed the South that

[1] *Congressional Globe,* 1st Session, 36th Congress, p. 45.
[2] *Ibid.,* p. 265.

"the North will never tolerate a division of the territory. . . . that with all the appliances of art to assist, eighteen millions of men reared to industry, with habits of the right kind, will always be able to cope successfully, if it need be, with eight millions of men without these auxiliaries." [1]

In the Senate, Mr. Davis, of Mississippi, replying to a charge that he was for disunion in case a Republican was elected President, said: "If . . . . a man were to seize the reins of Government, not to administer it according to the Constitution, but to pervert it to our destruction, to make this Government one of hostility to us, we would with the right hand redress our wrongs. That is my opinion now. If a man is willing to perjure himself by taking the oath to maintain the Constitution that he may get possession of the powers of this Government to subvert it to the ends of that platform [referring to Mr. Seward's Rochester speech before quoted], I tell him, sir, that I have too much pride and confidence in the South to believe they ever will submit. For one single individual, I can speak,—I never will. If driven to exile, I prefer it to tame submission to a traitor and perjurer who sought the possession of the Government in order that he might overthrow the Constitution." [2]

Mr. Davis, in replying to Mr. Wilson, of Massachusetts, referred to a speech made by the latter on the twentieth anniversary of the establishment of Mr. Garrison's newspaper, —the *Liberator,*—and quoted from that speech:

"For twelve years I have read the *Liberator;* and, sir, if I love liberty and loathe slavery and oppression, if I entertain a profound regard for the rights of man all over the globe, I owe it, in a great degree, to the labors of William Lloyd Garrison. [Prolonged applause.]" [3]

Mr. Davis then said that he had read the *Liberator* for some years and found standing firmly fixed, permanent, as the caption of the last column of the first page, these words:

"No Union with slaveholders.

"The United States Constitution is a covenant with death, and an agreement with hell."

[1] *Congressional Globe,* 1st Session, 36th Congress, p. 120.
[2] *Ibid.,* p. 577.
[3] *Ibid.,* p. 577.

Under this caption he read from the quotation in the *Liberator* the following remarks from Mr. Channing:

"There is some excuse for communities when, under a generous impulse, they espouse the cause of the oppressed in other States and by force restore their rights; but they are without excuse in aiding other States in binding on men an unrighteous yoke. On this subject our fathers, in framing the Constitution, swerved from the right. We, their children, at the end of half a century, see the path of duty more clearly than they, and must walk in it. To this point the public mind has been long tending, and the time has come for looking at it fully, dispassionately, and with manly and Christian resolution." [1]

And from the same speech of Mr. Wilson he read this extract:

"We shall arrest the extension of slavery, and rescue the Government from the grasp of the slave power. We shall blot out slavery in the national capital. We shall surround the slave States with a cordon of free States. We shall then appeal to the hearts and consciences of men, and in a few years, notwithstanding the immense interests combined in the cause of oppression, we shall give liberty to the millions in bondage." [2]

Mr. Davis, in replying further to Mr. Wilson, who had alleged the early action of Massachusetts against traffic in slaves, quoted from Bradford's history of that State: "No law was ever passed under the provisional government [of Massachusetts] interdicting this most disgraceful traffic." In answer to Mr. Wilson's confession that Massachusetts had reduced a few Indians to slavery, Mr. Davis stated that white men had also been enslaved there. He referred to the proceedings of a meeting that had been recently held in Massachusetts, and quoted from an address made on the occasion that Massachusetts was slaveholding from the beginning; she not only held and sold black slaves, but white slaves, too. The captives who were taken in the English civil wars were sent over and sold there as slaves. In 1659 her courts sentenced two white persons to be sold as slaves in the Barbados, or in Virginia, for the crime of siding with the

[1] *Congressional Globe,* 1st Session, 36th Congress, p. 577.
[2] *Ibid.,* p. 578.

Quakers. As for Indian or Negro slavery, it existed in Massachusetts very early. The Puritans held slaves as early as 1637, a few years after the settlement. In 1641, we find the following among Massachusetts laws:

"There shall never be any bond slavery, villeinage, nor captivity among us, unless it be lawful captives taken in just wars [meaning, I suppose, the wars with the Indians], and such strangers as willingly sell themselves or are sold unto us; and these shall have all the liberties and Christian usages which the law of God established in Israel requires." [1]

Under this law a man was so absolutely free that he had the power of selling his unalienable, natural, and inherent right to liberty.

This idea of men selling themselves into slavery early took root in New England and lived with great pertinacity. The Constitution of Vermont, adopted in 1777, after declaring that all men are born equally free and independent, and have a natural, inherent, and unalienable right of enjoying and defending liberty, prohibited the involuntary servitude of any person after full age (males 21, females 18) "unless they are bound by their own consent after they arrive at such age, or bound by law for the payment of debts, damages, fines, costs, and the like." This provision was repeated *in totidem verbis* in the Constitution of 1793, and so far as we have learned, is a part of the Constitution to this day.

"In 1705, by another act, slaves, for certain offenses, were to be sold out of the province. Any Negro or Mulatto who should strike any of the English, or other Christian nation, was to be severely whipped. The Provincial Congress of Massachusetts prohibited the enlistment of slaves in the army, thus showing that slavery legally existed there in May, 1775. The reason given is a curious one: that they were contending for the liberties of the colonies, and the admission into the army of any others but freemen would be inconsistent with the principles to be supported, and reflect dishonor on the colony." [2]

Mr. Iverson, of Georgia, read advertisements in the Massachusetts *Gazette* of 1768, giving notice of sale at public auction of a "likely Negro man," "of a Negro man forty

[1] *Congressional Globe,* 1st Session, 36th Congress, p. 599.
[2] *Ibid.*

years old," "of a boy fourteen years old," "of a girl twelve years old," and of a "black Negro girl thirteen years old." These advertisements intermingled with the Negroes the sales of various articles of personal property, as Madeira wine, calicoes, border silks, linen, twistings, housings, holsters, and so on.

It was not omitted to be urged by the Southerners that the fiercest opposition to slavery was not bottomed on any love for the Negro, but was a mere contest for political power; and it was confessed by them that political power, or the power to protect the South in the Union, was their object.

Mr. Smith, of Virginia, read a letter from Mr. Jefferson to Mr. Holmes, of Massachusetts, dated April 22, 1820, in which it was said, in speaking of the Missouri question: "But this momentous question, like a fire-bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union. It is hushed, indeed, for the moment. But this is a reprieve only, not a final sentence. A geographical line coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated; and every new irritation will mark it deeper and deeper. I can say, with conscious truth, that there is not a man on earth who would sacrifice more than I would to relieve us from this heavy reproach, in any practicable way. The cession of that kind of property, for so it is misnamed, is a bagatelle which would not cost me a second thought, if, in that way, a general emancipation and expatriation could be effected; and gradually, and with due sacrifices, I think it might be. But, as it is, we have the wolf by the ears, and we can neither hold him, nor safely let him go. Justice is in one scale and self-preservation in the other. Of one thing I am certain, that as the passage of slaves from one State to another would not make a slave of a single human being who would not be so without it, so their diffusion over a greater surface would make them individually happier and proportionally facilitate the accomplishment of their emancipation by dividing the burden on a greater number of coadjutors." [1]

Mr. Jefferson, in his letter to Mr. Pinckney, dated Sep-

[1] *Congressional Globe,* 1st Session, 36th Congress, p. 251.

tember 30, 1820, said: "The Missouri question is a mere party trick;" and in his letter to LaFayette, December 26, 1820, "It is not a moral question, but one merely of power." [1]

The increased happiness of the slaves that was to come from diffusion, it will be remembered, was pressed by Mr. Clay in the debates on the Missouri question.

Mr. Smith read also an extract from a letter by Mr. Madison to Mr. Monroe on the Missouri question, dated February 20, 1820, in which it was said: "I find the idea is fast spreading that the zeal with which the extension (so called) of slavery is opposed has, with the coalesced leaders, an object very different from the welfare of slaves, or a check to their increase, and that the real object is, as you intimated, to form a new state of parties founded on local instead of political distinctions." [2]

Mr. Smith also read from Mr. Seward's speech at Cleveland, Ohio, in which he stated: "Slavery can be limited to its present bounds; it can be ameliorated; it can be, and it must be abolished; and you and I can and must do it. . . . Correct your own error that slavery has constitutional guarantees which may not be released and ought not to be relinquished."

He quoted from the proceedings of a public meeting in Massachusetts: "Resolved, That we would rejoice in a successful slave insurrection in the South, and that in killing a slaveholder to obtain freedom the slave is not guilty of any crime; that the slaveholder should be made to dream of death in his sleep, and to apprehend death in his dish and teapot; that fire should meet him in his bed, and poison should meet him at the table." [3]

And he quoted from a conversational debate in the House of Representatives, between Mr. Dillet, of Alabama, and John Quincy Adams, in which Mr. Adams assented to a charge by Mr. Dillet that he had stated that the abolition of slavery must come, though women and children should be slain, though blood should flow like water, though the Union should be destroyed, though the Government be broken up, though five millions of people of the South be slain.

[1] Randall's "Life of Jefferson," Vol. 3, pp. 457-8.
[2] *Congressional Globe*, 1st Session, 36th Congress, p. 252.
[3] *Ibid.*, p. 260.

Mr. Adams, in his seat: "Five hundred millions! Yes, let it come." [1]

From these specimens some idea of the nature and character of the debate may be gathered. It is not needful to pursue them further. It may be as well, however, to remark that the geographical line spoken of by Mr. Jefferson had now become distinctly marked. The passions of men on both sides were profoundly excited. The Presidential election of that year was on hand. The supreme object seemed to be to win it. Mr. Seward was set aside by the Republican Convention and Mr. Lincoln nominated, with Hamlin, of Maine, for Vice-president. The Democrats divided,—one part nominated Mr. Douglas and Mr. Johnson; the other, Mr. Breckinridge and General Lane. Each section of the Democrats took one of its candidates from the North and one from the South. Both of the Republican nominees were from the North. The Union party nominated John Bell, of Tennessee, and Edward Everett, of Massachusetts.

The Republican Platform, among other things, declared, "that the maintenance of the principles promulgated in the Declaration of Independence and embodied in the Federal Constitution 'that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men, deriving their just powers from the consent of the governed,' is essential to the preservation of our Republican institutions; and that the Federal Constitution, the rights of the States, and the union of the States must and shall be preserved."

In the fourth resolution, after an affirmance of the right of each State to order and control its own domestic institutions, there was an implied condemnation of the invasion of Virginia by John Brown, in these words: "We denounce the lawless invasion, by armed force, of the soil of any State or Territory, no matter under what pretext, as among the gravest of crimes." It demanded also the immediate admission of Kansas, and declared in favor of the exclusion of slavery by Congressional enactment whenever such exclusion was necessary.

[1] *Congressional Globe,* 1st Session, 36th Congress, p. 258.

The Douglas Democratic platform reaffirmed the platform adopted by the party at Cincinnati in 1856; and, reciting that there were differences among the party as to the powers of territorial Legislatures and of the powers and duties of Congress over the institution of slavery, professed that they would abide by the decisions of the Supreme Court on these questions of constitutional law.

The Breckinridge Democratic platform affirmed the equal rights of all citizens of these United States to settle with their property in a Territory, which rights should not be impaired by legislation, either of the Territory or of Congress. It affirmed the duty of Congress to protect, when necessary, the rights of persons and property in the Territories, and wherever its constitutional authority extended. It also affirmed that sovereignty in a Territory commenced when settlers in adequate numbers formed a Constitution for admission into the Union which was consummated by admission; and that a State so organized should be admitted, whether its Constitution recognized or prohibited slavery.

The Union platform, after averring that experience had demonstrated that political platforms adopted by partisan conventions had had the effect to mislead and deceive the people and to widen the political divisions of the country by the creation and encouragement of geographical and sectional parties, resolved that it was the part of duty and patriotism to recognize no political principles other than the Constitution of the country, the union of the States, the enforcement of the laws, and so on.

The vote was as follows: For Mr. Lincoln, one hundred and eighty votes; Breckinridge, seventy-two votes; Bell, thirty-nine votes; Douglas, twelve votes.

Bell carried Virginia, Tennessee, and Kentucky; Breckinridge, all the other Southern States, except Missouri, which was carried by Douglas.

The canvass was exciting and sectional. In the North slavery and slaveholders were denounced. The fugitive slave law was condemned. Though no purpose was avowed to interfere by direct action to abolish slavery in the States, yet slavery was held to be inconsistent with the principles of the Declaration of Independence and condemnation of it was embodied in the Constitution, as stated in the Republican

platform; and a determination was avowed to destroy it by surrounding it with a cordon of free States. The higher-law doctrine was embraced. The irrepressible conflict, that the Union could not endure half slave and half free, was proclaimed as a self-evident truth. That the Constitution was a covenant with death and an agreement with hell was taught. It was also announced that the Supreme Court was to be reorganized so as to make the judges political representatives of sections and States instead of the lawful and impartial expositors of the Constitution,—it was henceforth to speak the voice of the dominant party and section, not to enforce the guarantees of the Constitution.

The South could but observe the growing disposition of the North against slavery and the determination to take such measures as would ultimately destroy it. It was evident that the North, as affirmed by Mr. Channing, was coming to the conclusion that our fathers had swerved from the right in framing the Constitution, and that the present generation, seeing the path of duty plainer than our fathers, were determined to walk in it for the destruction of slavery. The existence of the irrepressible conflict had, in fact, been demonstrated.

The Southern people had no wish to extend slavery to the Northern States. In fact, they had ever insisted that this was a matter for each State to decide for itself. They knew, as all men know, the utter impossibility of so extending it. They knew that neither Mr. Lincoln nor Mr. Seward entertained the least fear of such extension. They knew, therefore, that the declaration that all the States must be either slaveholding or the contrary meant that in them all slavery must be abolished. They felt, as Mr. Jefferson had said, that they had the wolf by the ears, and they could not let go with safety. They saw that the African race was rapidly increasing in their midst, and they shrank back at the contemplation of the fact that when emancipation should come the Negroes would probably outnumber them. They remembered that they were not responsible for the introduction of the African race into this country, and that this was acknowledged even by the North. They knew that the Abolitionists, whose views seemed now to shape largely the policy of the North, were opposed to colonization and in favor of amalgamation, as

Mr. Clay had declared they were;[1] yet they knew, too, that the Northern States had taken steps to save themselves from the evils and dangers of a numerous free Negro population by enacting laws that,—in the remonstrating language of Mr. Dawes, with reference to the newly formed States of the West, in his letter of September 26, 1859, to W. C. Neill,—would "disfranchise, disable, and drive out the free Negroes from their borders."[2] Compromises had been resorted to in vain. They had proven to be, as Mr. Jefferson said, "a reprieve only, not a final sentence." The repudiation of the Constitution with respect to the surrender of fugitive slaves and the denunciation of that other compromise that allowed three-fifths representation for the slaves had in fact become the watchword and battle-cry of the assailants of the South. The Southern people remembered that the Missouri compromise had been repudiated by the North in less than a year after it was made, and also in 1848, when it was proposed with reference to Oregon, and again when it was proposed in 1850 to be applied to the territory acquired from Mexico; and when, in 1854, in accordance with the great compromise of 1850, it had been superseded, it then for the first time became, or was claimed to be, a sacred compact between the sections, its repeal having been made the occasion of fresh assaults on the South that were more determined and bitter than ever before.

They thus saw, or thought they saw, that in the future they were, for no fault of theirs, to be proscribed in the common government, and held not only unworthy of any leadership or influence in the common councils of the Union, but as objects of suspicion and distrust. They felt that their dearest interests were to be subjected to the officious and unfriendly intermeddling of a power that was both able and willing so to unsettle society and even their local governments as, in their judgment, to destroy them.

It was foreseen that these policies and measures would result in emancipation of the African race, which, remaining in the South as a part of the permanent population, and being clothed with the rights of citizenship, would, by the inevitable antagonism of the diverse races, prevent all progress

[1] *Congressional Globe*, 1st Session, 36th Congress, p. 254.
[2] *Ibid.*, 266.

and growth, and finally result in bloodshed because of the rivalry for race domination. Nor was it regarded as of small moment that emancipation would not come, as it had in the Northern States, at a time and under circumstances and conditions that the white people of the South, judging what is best for their own safety, should themselves ordain; but would be forced by a power outside, directed by fanaticism and an enmity to the whites that had been engendered and intensified by long years of bitter contests over this very matter.

That the South was sincere in these apprehensions there is no doubt. This was confessed by distinguished Northern men of both parties.

Mr. Wade, of Ohio, on December 17, 1860, said: "But what has caused this great excitement? Sir, I will tell you what I suppose it is. I do not (and I say it frankly) so much blame the people of the South; because they believe, and they are led to believe by all the information that ever comes before them, that we, the dominant party to-day, who have just seized upon the reins of this government, are their mortal enemies, and stand ready to trample their institutions under foot. They have been told so by our enemies at the North." [1]

Mr. Douglas acknowledged that the Southern people had just apprehensions that their domestic institutions were to be assailed and that their constitutional rights were to be invaded and destroyed; and he referred to the above quotation from Mr. Wade to show that he also acknowledged that such was their belief.

So, upon the election of Mr. Lincoln, seven of the Southern States promptly passed ordinances of secession, and these were soon followed by four others.

It has been urged against the South that these ordinances were a traitorous attempt on the part of the people of these States to destroy the Government.

[1] *Congressional Globe*, 2d Session, 36th Congress, p. 100.

CHAPTER X

SECESSION

WITHOUT essaying at this day to defend the legality and validity of secession, it may well be pardoned even by the most inveterate enemy of the Southern people if a statement be made that may at least tend to modify opinions and impressions entertained by the Northern people that were injurious to the people of the South.

Since the Union has been restored and the doctrine of secession condemned by arms and by constitutional amendment, and since by the consent of the great body of the Northern people the disfranchisement that they themselves in heat and passion imposed has been removed from the Southern people, who by such removal have been thereby declared worthy of political trust and power, it cannot but be good that the people of the stronger section shall believe, if the belief be well founded, that their fellow-citizens of the South, —their brethren, co-heirs with them of the great principles of constitutional liberty that descended to them both from a common ancestry,—are pure, just, conservative, and honorable men. Certainly every one but a political Pharisee (of whom it is hoped there are but few in the country) who cherishes as his dearest earthly treasure the conviction of a personal holiness that the favor and partiality of a beneficent God has not permitted to others will rejoice in any evidence that may convince the world,—as well as himself,—that American institutions have never produced eleven millions of traitors,—men lost to all sense of obligation to the Constitution of their country and false in the discharge of their political duties under it.

If this can be done, as it is hoped it can be, without renewing the argument in favor of the right of secession and reopening sectional and irritating questions settled as to the

future by the force of arms and the general acquiescence of all, it will be a task well performed in the interests of our common country. Then let it be noted that no attempt will be made in this paper to present the legal argument in favor of the right of secession. That duty may be assumed at some future time, if it shall be deemed to be in the interest of a common brotherhood.[1] So far as the present paper is concerned, the reader, if that be a comfort or a joy to him, may indulge to the top of his bent the conviction that secession is a heresy in law and a crime under the Constitution. We are not now appealing to that great tribunal that at last must settle all questions of this kind, a fair and impartial posterity, to render their judgment on the legal questions involved. On the contrary, we are appealing to the present generation,[2] a majority of whom acted on the one side or on the other, for that impartial examination of the conduct of the people of the South, that will render judgment only after a fair consideration of all the surroundings that caused and gave character to their action.

And, first of all, it must be remembered that the people of the United States belonged to a race that in all its history never sanctioned the doctrine of passive obedience. Their history from its earliest dawn is full of instances in which the Anglo-Saxon people righted what they deemed their wrongs, or attempted to do so, by force or revolution. Nor must it be forgotten that as our American institutions grew up the people were tutored in the principles of freedom by the continued and repeated resistance of the colonies to the acts of the mother country. And finally when in 1776 the pretensions of the British Crown and Parliament drove the colonies to forcible resistance, in the immortal Declaration that justified that act it was announced as the foundation of their right that governments derive "their just powers from the consent of the governed," and that this consent may rightly be withdrawn when, in the opinion of the governed (not in the judgment of the rulers), the Government may become destructive of the end for which it was established. This doctrine was fundamental in the American idea of free gov-

[1] Appendix A. Minority Report on National Inquest Bill U. S. Senate.

[2] Written about 1891 or 1892.

ernment. It was so announced in all of the State Constitutions that were formed at the era of the Declaration.

In the first Constitution of Massachusetts, framed in 1790, it was declared "that whenever the just objects of government are not obtained, the people have a right to alter the government and take measures necessary for their safety, prosperity, and happiness," and "the people alone have an incontestable, inalienable, and indefeasible right to institute government and to reform, alter, or totally change the same when their protection, safety, prosperity, and happiness require it."

And, as if to show they meant by "the people" only the people of Massachusetts, it was thus declared in Article Four:

"The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign and independent State, and do, and forever hereafter shall, exercise and enjoy every power and jurisdiction and right which is not, or may not hereafter be, by them,"—not by the people of the United States, but *by them,*—"expressly delegated to the United States of America in Congress assembled."

Connecticut, in the preamble of the Constitution of 1776, declared that "the people of this State, being by the providence of God free and independent, have the sole and exclusive right of governing themselves as a free, sovereign, and independent State." In the first paragraph of the Constitution they declare that "this Republic is and shall forever be and remain a free, sovereign, and independent State by the name of the State of Connecticut."

Vermont was neither known nor recognized as an independent State at that date, but was claimed by New York, New Hampshire, and Massachusetts. Her existence as a State, independent of these three, was so utterly ignored that she was not represented in the Continental Congress; and when the treaty with Great Britain was made recognizing the Independence of the United States the name of Vermont was not mentioned with the names of the other thirteen, so that her legal separation from the British Empire depended upon the fact that she was a part of one or more of the above-named States. Vermont recognized fully the situation. In 1776 the people of that State made a Declaration of Independence, separating themselves from the State of New York,

reciting their grievances against that State, and also declaring that "the local situation of Vermont at its extreme part is upwards of four hundred and fifty miles from the seat of government of New York, which renders it extremely difficult to continue under the jurisdiction of said State." "Therefore," they declared, "it is absolutely necessary for the welfare and safety of the inhabitants of this State that it should be henceforth a free and independent State," declaring that a "just, permanent, and proper form of government should exist in it, derived from and founded on the authority of the people only, agreeable to the directions of the Honorable American Congress." They affirmed also "that all government ought to be instituted for the security and protection of the community. . . . and whenever these great ends of government are not obtained, the people have a right by common consent to change it and take such measures as to them may appear necessary to promote their safety and happiness." And then in framing the Bill of Rights to the Constitution they affirm in section six that "government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community . . . and the community hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish government in such manner as shall be by that community judged most conducive to the public weal."

Pennsylvania in her Constitution of 1776 made similar declarations.

Virginia, the great leader, not only of the South, but at that time of the whole country, in the second section of the Bill of Rights to her Constitution, adopted June 12, 1776, nearly a month prior to the Declaration of Independence, declared:

"That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; and of all the various modes and forms of government that is best which is capable of producing the greatest degree of safety and happiness, and is most effectually secured against the danger of maladministration; and that when any government shall be found inadequate, or contrary to these purposes, a majority of the community hath an indubitable, inalienable, and indefeasible right to reform,

alter, or abolish it in such manner as shall be deemed most conducive to the public weal."

And that great State, affirming its sovereignty and independence, as Massachusetts did four years afterward, in section fourteen of the Bill of Rights, declared that "the people have a right to a uniform government; and, therefore, no government separate from or independent of the government of Virginia ought to be erected or established within the limits thereof."

Maryland, by her Constitution of 1776, declared that "whenever the ends of government are perverted and the public liberty manifestly endangered, and all other means of redress are insufficient, the people may, and of right ought to, reform the old and establish a new government. That the doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind."

It will be noticed that these declarations were made at the most important era in our history. They enunciated the political truths that were the foundations of American politics. They were the institutions by which our people were taught, and from which they learned, the fundamental principles of free government. These principles were the foundation stones of our political edifice.

And all the States, when they came to form the Articles of Confederation, which received their final shape on June 26, 1778, declared in Article Two, "that each State retains its sovereignty, freedom, and independence." And, after also declaring that the agreement was to Articles of Confederation and perpetual union, eleven of these States seceded from this perpetual union, each State acting separately for itself, and formed a new government, leaving two as independent foreign nations. And this was done without any suggestion that it was a violation of the agreement for a perpetual union or of the duties that the seceding States owed to the others.

These were the teachings of the era of the Revolution, before the adoption of the Constitution. The practice of the colonies had been in accordance therewith. Such also was the view of the States after the Declaration of Independence. The New England Confederacy, in 1641, had been formed

and afterward dissolved. The union, under the Articles of Confederation, therein declared to be perpetual, had been dissolved against the consent of two members at least. And the new union was the result of an accession of the several States thereto, each acting for itself and by itself.

The convention of the great State of New York, which ratified the Constitution of the United States, having among its members the most distinguished men of the union, including Alexander Hamilton, in the very act of ratification thought it proper to declare with reference to the Federal Government then about to be established:

"That all power is originally vested in and consequently derived from the people, and that government is instituted by them for their common interests, protection, and security. That the powers of government may be reassumed by the people whenever it shall become necessary to their happiness; that every power, jurisdiction, and right, which is not by said Constitution clearly delegated to the Congress of the United States or the Departments of the Government thereof, remains to the people of the several States, or to their respective State Governments, to whom they may have granted the same."

The convention of Rhode Island declared:

"That all power is naturally vested in and consequently derived from the people; that magistrates therefore are their trustees and agents, and at all times amenable to them. That the powers of government may be reassumed by the people whensoever it shall be necessary to their happiness."

Oliver Ellsworth, speaking in the Connecticut Convention, in favor of ratifying the Constitution, said: "This Constitution does not attempt to coerce sovereign bodies, States, in their political capacity. No coercion is applicable to such bodies but that of an armed force. If we should attempt to execute the laws of the Union by sending an armed force against a delinquent State, it would involve the good and bad, the innocent and guilty, in the same calamity." [1]

(See Mr. Madison's speeches in convention on coercion.)

Mr. Wilson, in the convention of Pennsylvania, said: "But, in this Constitution, the citizens of the United States appear dispensing a part of their original power in what

[1] Elliot's Debates, Vol. II, p. 197.

manner and in what proportion they think fit. They never part with the whole; and they retain the right of recalling what they part with." [1]

After the adoption of the Constitution and the formation of the new Government under it the right of a State to act for itself alone was advocated in the highest quarters and on the most solemn occasions. The alien and sedition laws were regarded as a great step toward consolidation, and they gave rise to the celebrated resolutions of Virginia in 1798 and of Kentucky in 1799. Of the former Mr. Madison was the author, and the latter were drawn by Mr. Jefferson.

The Virginia resolutions declared that the Constitution of the United States was a compact to which the States were parties; and that in case of the deliberate, palpable, and dangerous exercise of other powers not granted by the compact the States who are parties thereto have the right, and are in duty bound, to interpose for arresting the progress of the evil and for maintaining within their respective limits the authorities, rights, and liberties appertaining to them.

The Kentucky resolutions declared:

"That the several States comprising the United States of America are not united on the principle of unlimited submission to the general government; but that by compact under the style and title of the Constitution for the United States of America and of amendments thereto they constituted a general government for special purposes, delegated to that government certain definite powers, reserving, each State to itself, the residuary mass of right to their own self government, and that whensoever the general government assumes undelegated power, its acts are unauthoritative, void, and of no force; that this government created by this compact was not made the exclusive or final judge of the extent of the powers delegated to itself; since that would have made its discretion and not the Constitution the measure of its powers; but that, as in all other cases of compact among parties having no common judge, each party has an equal right to judge for itself as well of infractions of the Constitution as of the mode and measure of redress."

The Republican platform of 1800, on which Mr. Jefferson was elected to the Presidency, breathed the same spirit,

[1] Elliot's Debates, Vol. II, p. 437.

declaring that the Constitution was adopted by the States, affirming it to be a duty to preserve to the States powers not yielded by them to the Union, and pointing out the duty of resistance to existing movements for transferring all the powers of the States to the general government.

It is well also to note that in the responses of the other States to the resolutions of Virginia, they all,—Rhode Island, Connecticut, Massachusetts, New Hampshire, and Vermont, —affirmed that the Supreme Court is the final judge of the powers granted; yet none of them denied the power or the duty of the States to preserve their reserved rights, but they denied only that the Legislatures of the States were competent to decide upon the constitutionality of the laws of Congress.

The Constitution had been adopted by the people of each State for itself in a convention of the people of that State that had been called for the express purpose of deciding upon ratification or rejection,—a convention that was a power well settled in American law to be higher than any State Legislature. The Legislature of Massachusetts in their answer to Virginia and Kentucky called attention in the plainest manner to the distinction between the powers of the Legislature and of the people assembled in convention,—affirming it to be a duty solemnly to declare that, while they held sacred the principle that the consent of the people is the only pure source of just and legitimate power, they cannot admit the right of the State Legislatures to denounce the administration of the Government to which the people themselves, by solemn compact, have exclusively committed their national concerns.

It will be further noticed that none of these States denied the fundamental proposition of the Virginia resolutions, that the Constitution was formed by the States; and that Massachusetts, on the contrary, declared explicitly that she "will always cooperate with her Confederate States in rendering the union productive of national security, freedom, and happiness."

It is to be remembered that in the great debate between Mr. Webster and Mr. Calhoun in 1833 the main issue was as to whether the Constitution was a compact between the States, the latter affirming and the former denying this proposition. It was conceded that if the Constitution were a com-

pact or confederacy between sovereign States, then the right of judging of infractions of the compact and the mode of redress belonged to each of the confederates, or, in other words, secession was a lawful remedy.

This language of "a compact between the States,"—"confederacy,"—was habitually applied to the Constitution and the Union under it in the earlier days of the Government. One of the first acts of the American Senate in 1789 was their answer to the inaugural address of General Washington. In this they answered the President that they would "at all times cheerfully co-operate in every measure which may strengthen the Union, conduce to the happiness, or secure and perpetuate the liberties of this great Confederate Republic." [1]

Mr. Madison in the same year, in a speech advocating the submission to the States of amendments to the Constitution, spoke of North Carolina and Rhode Island as two States "that had not thought fit to throw themselves into the bosom of the Confederacy" and of the other States as having "embraced the Constitution." [2]

He spoke of his sorrow for the men in Rhode Island, who, being favorable to the Union, were yet "kept without the embrace of the Confederacy." [3]

Mr. Madison, in proposing the first article of amendment to the Constitution, proposed to insert the word "national" before "religion." Mr. Gerry, of Massachusetts, objected, because it would favor the idea of those who considered that the form of government consolidated the union.

Mr. Madison withdrew the proposition, observing that "the words 'no national religion shall be established by law' did not imply that the Government was a national one." [4]

And in reference to the tenth amendment, which declared that the powers not granted by the Constitution are reserved to the States, Mr. Madison said: "I find, from looking into the amendments proposed by the State conventions, that several are particularly anxious that it should be declared in the Constitution that the powers not therein delegated should

[1] Annals, 1st Congress, p. 32.
[2] *Ibid.*, p. 432.
[3] *Ibid.*, p. 443.
[4] *Ibid.*, p. 731.

be reserved to the several States. Perhaps other words may define this more precisely than the whole of the instrument now does. I admit they may be deemed unnecessary; but there can be no harm in making such a declaration." [1] And in his draft of that amendment the undelegated and unprohibited powers were reserved to the "States respectively," [2] and, on motion of Mr. Carroll, the words "or to the people" were inserted without debate.

In 1803 Mr. Thatcher, of Massachusetts, in a speech opposing the admission of Louisiana, said that "the Confederation under which we now live is a partnership of States, and it is not competent to it to admit a new partner but with the consent of all the parties." [3] In the same debate Mr. Griswold, of Connecticut, spoke of the admission of Louisiana as "repugnant to the original compact between the States, and a violation of the principles on which that compact was formed"; of the Union as "a partnership between the States"; of the Federal Government as *the agent of the States* "appointed to execute the business of the compact in behalf of the principals." [4]

In 1811 Mr. Quincy, of Massachusetts, used the same language in opposing the admission of Louisiana, calling the Constitution a political compact and the States "sovereign." Speaking of the proposed admission as inconsistent with the intent of the contract and the safety of the States which established the association, he announced it as "a plain moral principle of public law and conformable to the plainest dictates of reason that the violation of a contract," such as he had described the Constitution to be, "may be considered as exempting the other from its obligations." And finally he asserted deliberately and with emphasis that if Louisiana were admitted, "it would be the right of all the States and the duty of some of them to prepare definitely for a separation, amicably if they can, forcibly if they must."

The answer of the State of Connecticut to the invitation of Massachusetts to meet the New England States in convention at Hartford speaks of the Union as a "Federal com-

[1] Annals, 1st Congress, p. 441.
[2] *Ibid.*, p. 761.
[3] *Ibid.*, p. 454.
[4] *Ibid.*, p. 462.

pact," complains of infractions of it, and speaks of the rights of the States and the determination to defend them.

The proceedings of the Hartford Convention, which have hereinbefore been set out, speak of a State in the Union as a "Confederate State," of the "sovereignty of a State," and aver that the States, "having no common umpire, must be their own judge and execute their own decisions."

In the great controversy about the admission of the State of Missouri before noted the Union was habitually called a "Confederacy" and the States parties to it. Thus, Mr. Clay, in the 16th Congress,[1] Mr. Edwards, of Illinois,[2] and Mr. Mellen, of Massachusetts, said: "Independent State in the Confederacy." [3]

Mr. Ruggles, of Ohio, said, "A new member of this great Confederacy," [4] and spoke of the States as "parties to the Federal Compact." [5]

Mr. Trimble, of Ohio, said, "A general Compact or Federal Constitution, to which the States, in their corporate capacities, were also parties." [6]

Harrison Gray Otis, of Massachusetts, said, "The Federal Union consisted of States which had joined the Confederacy under various circumstances"; [7] and speaking in reference to the old States, he said, "The States are the sources of power, and the Constitution is the reservoir"; the old "States were the grantors" of powers; the Constitution is a "Federal Compact." [8]

Mr. Holmes, of Massachusetts, spoke of the Constitution as "a compact formed by the thirteen States."

Pennsylvania, in resolutions of her legislature against the admission of Missouri, insisted "upon a sacred observance of the constitutional compact."

Mr. Pinckney, in the debate on the Missouri question in 1820, said: "What is that union? A confederation of States equal in sovereignty, capable of everything which the Consti-

[1] Annals, 1st Session, 16th Congress, pp. 831 and 841.
[2] *Ibid.*, p. 190.
[3] *Ibid.*, p. 183.
[4] *Ibid.*, p. 279.
[5] *Ibid.*, p. 280.
[6] *Ibid.*, p. 288.
[7] *Ibid.*, p. 242.
[8] *Ibid.*, p. 245.

tution does not forbid, or authorize Congress to forbid. It is an equal Union between parties equally sovereign. They were sovereign independently of the Union." "By acceding to it the new State is placed on the same footing with the original States." [1]

All through the speech he spoke of the Constitution as a compact.[1]

In fact this language was habitual during the earlier days of the country.

In a later day, as we have seen, in the manifesto issued in 1850 by twenty members of Congress, signed among others by J. Q. Adams and Mr. Giddings, the admission of Texas was denounced as a violation of the "national compact" and "identical with the dissolution of the Union."

The Democratic platform of 1852, on which Mr. Pierce was elected, carrying every State but four,—Vermont, Massachusetts, Kentucky, and Tennessee,—declared that the Democratic party would "faithfully abide by and support the principles laid down in the Virginia and Kentucky resolutions of 1798 and 1799"; and, in the report of Mr. Madison to the Virginia Legislature in 1799, that "it adopts these principles as constituting one of the main foundations of its political creed, and is resolved to carry them out in their obvious meaning and import." This declaration was reaffirmed in 1856, when the party elected Mr. Buchanan, and again in 1860 by both the Douglas and the Breckinridge wings of the party; and though it was then defeated, a majority of the popular vote was cast in the aggregate for these two nominees. It has been made clear, it is believed, from the imperfect reference to the public history of the country that the Southern people are entitled to the defense that there was reasonable ground to believe, and they did believe, that secession was a lawful right under the Constitution. Nothing further is affirmed now. So when Mr. Lincoln was elected, they, believing their rights and safety were endangered in the Union, sought them outside the Union by secession.

It may as well be stated here in answer to the charge that secession was an attempt to destroy the life of the nation and to overturn the Government of the United States that it was not contemplated by the Southern people to interfere in the

[1] Annals, 16th Congress, 1st Session, p. 397.

least with those States that adhered to the Union, or with their government. In fact, they appointed commissioners to treat with the United States Government as an independent power. They sought merely to withdraw themselves from subjection to a government, which, they were convinced, intended to wield its power to overthrow their domestic institutions, to disturb their domestic tranquillity, and to subjugate them to a position of inferiority in a Union that had been formed of equal States. If the eleven seceding States had been permitted peaceably to depart, or had succeeded in the contest of arms in establishing their independence, there would have been no destruction of the Government of the United States any more than there was a destruction of the Government of the British Empire by the secession of the American Colonies, or of the Government of New York by the secession of Vermont.[1] It would have remained the same government that it was before, with all its powers and faculties unimpaired. It would only have embraced less territory. But even as to that, it would, after the secession of the States, have embraced largely more territory than it did at the formation of the Constitution. That original territory, as we have seen, was claimed by the North, especially by New England, at every step from the acquisition of Louisiana in 1803 to the annexation of Texas in 1845, to be large enough for the Government of the United States, and that subsequent admissions of States were not allowable by the Constitution. All these acquisitions had come from the action of the South against the protest of the North and exceeded by many thousand square miles the territory of the seceding States. And as to Florida, Louisiana, Texas, Arkansas, and Missouri, their secession would have but redressed the wrong that the North complained was committed when they were admitted into the Union. The territory remaining to the United States after the secession of the Southern States is now occupied by a people numbering forty million,[2]—a population larger than that of any European country except Germany, and it will soon exceed Germany's by many fold. But they were not permitted to depart.

[1] Or the Government of Columbia by the secession of Panama.—Editor's note.

[2] About 1891-2.

CHAPTER XI

THE WAR AND ITS PURPOSES

The war commenced, notwithstanding the Convention that formed the Constitution had expressly negatived a proposition to confer on the Federal Government the authority to exert the force of the Union against a delinquent State. Mr. Madison had said in the Convention that a "Union of States containing such an ingredient seemed to provide for its own destruction. The use of force would look more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous contracts by which it was bound."

At first the position as thus assumed by Mr. Madison seemed to have weight with the National Executive. In his proclamation of the fifteenth of April, 1861, after the secession of the Southern States, the President in calling out the militia designated the force to be overcome as "combinations too powerful to be suppressed by the ordinary course of Government proceedings," and the purpose of the call was stated to be "to suppress said combinations and to cause the laws to be duly executed."

The purpose and object of the war was distinctly avowed both by the President and by Congress.

Soon after the battle of Bull Run, in July, 1861, the Senate of the United States passed a resolution declaring "that this war is not prosecuted upon our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor purpose of overthrowing or interfering with the rights or established institutions of those [seceding] States, but to defend and maintain the supremacy of the Constitution [of the United States] . . . . and to preserve the Union, with all the dignity, equality, and rights of the several States unimpaired; that as soon as these objects are accomplished the war ought to cease." [1]

[1] *Congressional Globe*, 1st Session, 37th Congress, p. 257.

The House of Representatives passed a resolution in almost identical language,—identical in substance in every particular.

That this resolution did not represent the true opinions and purpose of the war party was suspected, if not implicitly believed, by the South. In this belief they are now justified by the course of events before, during, and subsequent to the war, and by the declaration of one of the ablest and most distinguished generals and statesmen of the North,—a declaration that was made long afterward, when full opportunity had been given for a correct interpretation of the true meaning of events, free from all hindering embarrassment coming from the passions excited by the conflict of arms.

This interpretation was given of the purposes of the war on the 8th day of April, 1886, by Mr. Hawley, a Senator from the State of Connecticut. He said in a speech in the Senate on that day: "Against a race prejudice, against the prejudices, the deep, encrusted prejudices of centuries, men who hated the face of a Negro and would not have him near them, were led into and plunged into a great war and carried it on for four years, disguise it as you please, the substantial purpose of it all being to make it true that there should not be a slave upon the soil of this continent." [1]

The war proceeded with varying fortunes to either side. In March, 1862, very soon after the first great disasters to the Southern arms at Fishing Creek, Fort Henry, and Fort Donelson, and the evacuation of Bowling Green and a large part of Tennessee, Mr. Lincoln sent in a message to Congress recommending the passage of this resolution: "Resolved, That the United States ought to co-operate with any State which may adopt gradual abolishment of slavery, giving to such State pecuniary aid, to be used by such State in its discretion, to compensate for the inconveniences, public and private, produced by such change of system."

He urged this as a proper measure to detach the border States from the seceding States, thus rendering the suppression of the Rebellion more easy.

He declared that gradual and not sudden emancipation was better for all.[2]

[1] *Congressional Record,* 1st Session, 49th Congress, p. 3273.
[2] *Congressional Globe,* 37th Congress, 2d Session, p. 1102.

The resolution passed the House March 10,—ayes ninety-nine, nays thirty-six,—and received the sanction of the Senate April 2,—ayes thirty-two, nays ten. The Republicans as a rule voted for it and the Democrats against it.[1]

The majority of, if not quite all, the Senators and Representatives from the border slave States voted against it.

CONFERENCE BETWEEN THE PRESIDENT AND THE MEMBERS OF CONGRESS FROM THE BORDER STATES

On July 12, 1862, a conference took place between the President and the Senators and Representatives of the border States. In this Mr. Lincoln strongly urged action by the border States under the resolution above quoted. He expressed his regret that the Senators and Representatives from those States had not voted for it, and stated that "in my [his] opinion, if you had all voted for the resolution in the gradual emancipation message of last March, the war would now be substantially ended," alleging as the ground therefor that the seceding States, seeing that the border States would never join them, could not much longer maintain the contest. He urged immediate action by the border States, saying: "I do not speak of emancipation at once, but of a decision at once to emancipate gradually. Room in South America for colonization can be obtained cheaply and in abundance, and when numbers shall be large enough to be company and encouragement for one another, the freed people will not be so reluctant to go." [2]

The answers of twenty Senators and Representatives from the border States, among them John J. Crittenden, objected to the scheme, but avowed a determination to stand by the Union. It concluded thus: "If Congress, by proper and necessary legislation, shall provide sufficient funds and place them at your disposal, to be applied by you to the payment of any of our States, or the citizens thereof who shall adopt the abolishment of slavery, either gradual or immediate, as they may determine, and the expense of deportation or colonization of the liberated slaves, then will our States and people take the proposition into careful consideration for

[1] Cooper's "American Politics," Book I, p. 137.
[2] *Ibid.*

such decision as, in their judgment, is demanded by their interest, their honor, and their duty to the whole country." [1] The minority of the border State members made separate replies, but all objected to the scheme.

In this first executive suggestion for the abolishment of slavery in any of the States it will be noticed that emancipation by State action alone was contemplated. The portion of the United States was to be only as bearer of a part, if not all, of the burden of the measure; and emancipation was to be gradual and accompanied by the deportation and colonization of the freedmen. The judgment of the country, and of Mr. Lincoln himself, founded on long experience and observation, was that the freedmen should be removed from contact with the white race. There was not the slightest hint of emancipation by the act of the Federal Government, or of the citizenship of the emancipated slaves.

The next step taken was on September 22, of the same year, when Mr. Lincoln issued a proclamation that he would on January 1, 1863, declare all slaves free in States and designated parts of States, if such States and parts of States were not then "in good faith represented in the Congress of the United States." If this proclamation was intended, as it manifestly was, to induce the Southern people to lay down their arms and send Representatives to Congress, how vain and futile was this condition if, at that date, nearly two years after secession and consequent war, the dogma afterward set up by Congress was true, that the States by secession had forfeited their right to representation in Congress,—a right that could only be restored by legislation.

Mr. Lincoln also declared in the proclamation of September 22, 1862, that it was his purpose to recommend to Congress at its next meeting a practical measure tendering pecuniary aid to all the slave States that were not then in rebellion, and that may voluntarily adopt immediate or gradual emancipation; and "that the effort to colonize persons of African descent with their own consent, on this continent or elsewhere . . . . would be continued."

The promised proclamation was accordingly issued on the date named.

In his annual message of December, 1862, in redemption

[1] Cooper's "American Politics," Book I, p. 140.

of his promise just noticed, to present and recommend a scheme to aid in emancipation, Mr. Lincoln recommended amendments to the Constitution of the United States as follows:

1. Offering pecuniary compensation to every State that would abolish slavery by the year 1900;

2. Declaring free all slaves who shall have enjoyed actual freedom by the chance of war before the end of the rebellion, but loyal owners to be compensated;

3. Granting power to Congress to appropriate money and otherwise provide for colonizing free colored persons with their own consent at any place or places outside the limits of the United States.

In recommending these amendments to the favor and support of Congress and of the country, he said, "I cannot make it better known than it already is that I strongly favor colonization." And in combating the fears of the Northern people that the liberated Negroes would settle among them, he said: "Heretofore colored people have fled North from bondage, and now perhaps from bondage and destitution, but if gradual emancipation and deportation be adopted, they will have neither to flee from; their old masters will give them wages at least till new laborers can be found, and the freedmen will gladly give their labor in return, till new homes can be found for them in congenial climes and with people of their own blood and race. This proposition can be trusted on the mutual interests involved. And in any event, can't the North decide for itself whether to receive them?"

Here we have distinctly recommended not only deportation, with their consent, of the emancipated Negroes, but a distinct averment that emancipation was not to confer citizenship, as the right to exclude them from their borders is asserted for the Northern States. That they were an undesirable, not to say dangerous, population is admitted in the effort to show that emancipation would not be followed by an influx of freedmen into the North. This position, though adverse to the pretext under which the North refused admission to the State of Missouri under the compromise of 1820, was, as we have seen, admitted by the most eminent Republicans,—Messrs. Seward, Trumbull, and King,—to be correct on the occasion of the admission of Oregon; and it was acted

on by the majority of the Northern States in their laws against free Negroes, which, according to Mr. Dawes, before quoted, "disabled, disfranchised, and drove out from their borders free persons of African descent."

As further proof of the firm fixedness of the Northern mind of the necessity of the colonization of Negroes, reference is made to the Act of June 9, 1862, for the collection of the direct tax in the insurrectionary States, in which it was provided that of the proceeds of the leases of lands bought by the United States under the sale for the tax one-fourth part should be given to the States after the suppression of the rebellion "as a fund to aid in the emigration or colonization of any free person of African descent who may desire to remove therefrom to Hayti, Liberia, or any other tropical State or colony." [1]

Up to this point emancipation as a permanent thing, as resulting not only in freeing actual slaves, but also in prohibiting slavery thereafter, was contemplated only as the result of State action, each State acting for itself. The United States, as a means of ending successfully the war, was to aid only the States that were willing to emancipate. Mr. Lincoln's Emancipation Proclamation pretended to emancipate only the slaves then *in esse* and residing in certain districts. The lawfulness of the institution of slavery was left untouched, and the power of the States to legalize the slavery of other persons than those that were then freed was in no sense denied. The proclamation provided for the emancipation of certain slaves, but attempted no prohibition of slavery.

The war continued to be more and more to the advantage of the North. The resources of the South were being constantly exhausted, and the chances for her success had become desperate, even if it could be considered that any chance of success was left.

On June 7, 1864, the Republican National Convention at Baltimore nominated Mr. Lincoln for reelection and named Andrew Johnson as a candidate for the Vice-presidency. This convention made the first authoritative declaration in favor of the abolishment of slavery by the direct action of the Federal Government, without the consent of the States,

[1] 12 U. S. Statutes at Large, p. 425, Section 12.

and the first announcement of the determination to prohibit slavery forever in the United States. In their third resolution, after denouncing slavery as the cause and strength of the rebellion, and hostile to justice and the national safety, the Convention declared further, "We are in favor, furthermore, of such an amendment to the Constitution, to be made by the people in conformity with its provisions, as shall terminate and forever prohibit the existence of slavery within the limits or the jurisdiction of the United States." [1]

It will be noticed, however, that no declaration was made in favor of the citizenship of the Negro, notwithstanding the existence of the laws in most of the Northern States denying it and the well-known opinion of their candidate, Mr. Lincoln, as has been pointed out, and as will be illustrated by what follows.

Although Mr. Lincoln had decreed in his proclamation of September 22, 1862, the freedom of slaves only in such States and parts of States as were not on January 1, 1863, represented in good faith in Congress, he did not promulgate any plan for such representation. He evidently regarded the existing laws fixing the apportionment of Representatives and directing the election of Senators all the plan that was necessary.

On December 8, 1863, however, he issued a proclamation on this subject. He offered amnesty, with certain exceptions, to all persons engaged in the rebellion that would take an oath to support and defend the Constitution and the Union thereunder, and that would also swear to support all the laws of Congress and all the proclamations of the President made during the rebellion with reference to slaves "so long and so far as not modified or declared void by decision of the Supreme Court."

He provided that whenever a number of persons in any of the States of Arkansas, Louisiana, Texas, Mississippi, Alabama, Georgia, Florida, South Carolina, North Carolina, and Tennessee, omitting Virginia,—not less than one-tenth of the votes cast for President in 1860, and possessing the qualifications fixed by law immediately before secession, and excluding all others,—shall take such oath and establish a government Republican in form and in no sense contravening said oath, the State should receive the benefit of the clause in the

[1] Cooper's "American Politics," Book 2, p. 44.

Constitution by which the United States were agreed to guarantee to each State a Republican form of government and to protect it against domestic violence and invasion.

The proclamation contains this clause:

"And I do further proclaim, declare, and make known that any provision that may be adopted by such State government in relation to the freed people of such State, which shall recognize and declare their permanent freedom, provide for their education, and which may be yet consistent as a temporary arrangement with their present condition as a laboring, landless, and homeless class will not be objected to by the national Government."

To avoid misunderstanding it was declared that the proclamation had no reference to States wherein loyal State governments had all the while been maintained. As to whether Senators and Representatives would be admitted, he declared that was a matter wholly for the two Houses of Congress.

In this proclamation will be noted a change since the beginning of the year. Up to January 1, 1863, it was recognized, as before shown, that restoration to the Union would be recognized as accomplished by the mere act of the States themselves in sending in good faith a representation to Congress under existing laws. Now there was something else to be done,—there was to be a change of the State Constitution prohibiting slavery, made effective by the taking of an oath against slavery by all who were allowed to participate in the reorganization, and as to those refusing the oath, there was not only to be no participation in the forming of the Government, but they were to remain liable to the pains and penalties imposed for rebellion. It will be further noted that reorganization, restoration, or reconstruction, whatever may be its proper name, was to be based solely on white suffrage, on voters having the qualifications prescribed by law at the date of secession.

This proclamation contained undoubtedly the plan of restoration that met Mr. Lincoln's judgment. It contemplated reconstruction by white men, "excluding all others." As to Negroes, it provided only for their freedom, and this, too, by State action, and it did not contemplate Negro citizenship and Negro suffrage.

After the renomination of Mr. Lincoln on July 4, 1864,

Congress for the first time and for the only time during Mr. Lincoln's life provided a plan for restoration. The bill for that purpose was passed by both Houses and was entitled "A Bill to Guarantee Certain States, Whose Governments Have Been Overthrown, a Republican Form of Government." It provided the appointment of a provisional governor in each of the "States declared in rebellion," "who shall be charged with the civil administration of such State until a State government shall be recognized therein as hereinafter provided."

As resistance to the United States should be suppressed in any State the United States Marshal was required to enroll all the white male citizens of the United States residents of the State and to request each one to take an oath to support the Constitution of the United States and to designate those who took the oath and those who refused it; and if those taking the oath constituted a majority of the persons enrolled, the Governor was to invite the loyal people to elect delegates to a Convention for the re-establishment of a State Government subject to and in conformity with the Constitution of the United States. The Convention was to be composed of as many members as were in both houses of the last constitutional Legislature prior to secession, and were to be apportioned according to the white population returned as electors.

The delegates to the Convention were to be elected by the loyal white male citizens of the United States, twenty-one years old, who should have taken the oath of allegiance to the United States in the form prescribed by the act of July 2, 1862, which required a denial of any complicity in the rebellion.

It will be noted that the disfranchisement as to voting applied only to the electors for the delegates.

It was required that when the Convention met it should declare, on behalf of the people of the State, their submission to the Constitution and laws of the United States, and that it should adopt and incorporate in the Constitution of the State the following provisions:

"First. No person who has held or exercised any civil office, except offices merely ministerial and military offices below the grade of Colonel, under the Confederacy or any Confederate State, shall vote for or be a member of the Legislature or Governor." Thus the disfranchisement was lim-

ited to voting for and holding these two offices, Confederates being allowed to hold any other office and to vote for any other officer than these.

"Second. Slavery is forever prohibited and freedom of all guaranteed in said State.

"Third. Repudiation of all debts, State and Confederate, made in aid of the rebellion."

This was the congressional scheme of reconstruction, and it differed from the President's mainly in requiring that proceedings for reconstruction should be initiated by and consummated under Federal officers, and in disfranchising in those proceedings all persons that had in any way aided or sided with the Confederacy, instead of disfranchising also those that had recanted and renounced Confederate allegiance by taking the prescribed oath, and in requiring not only that these loyal men should be a majority of the white male adults, but that said majority should actively participate in the proceedings, instead of allowing one-tenth of the white males to reorganize the Government.

It was also provided that when a Constitution should be formed in accordance with the Act, and a copy thereof sent to the President, he, after obtaining the assent of Congress, should recognize the Government so established, and that from that date, and not before, the State might elect Senators and Representatives and electors for President and Vice-president.

The provisional Governor was to execute the laws of the State as they existed at the date of secession, except those relating to slavery and making a discrimination against colored persons in trials for and punishment of crimes. Jurors were to have the qualification of electors, that is, were to be only white adult males who were not involved in the guilt of rebellion; and taxes were to be collected under the tax laws that were in force at the date of secession.

By section twelve slavery was abolished and prohibited forever in the Confederate States; and by section thirteen heavy fines and long imprisonment were imposed on those who should deprive freedmen of their liberty.

By section fourteen it was enacted, "That every person who shall, after the passage of the Act, hold or exercise any office, civil or military, except offices merely ministerial and

military offices below the grade of Colonel, in the rebel service, State or Confederate, is hereby declared not to be a citizen of the United States."

This was substantially the scheme of Congress for reconstruction. It received the sanction of Congress on July 4, 1864. The war was then substantially ended. The condition of the Confederacy was so desperate that it was evident that the struggle could be continued but a few months longer. So the plan outlined above was the deliberate scheme of Congress that was soon to be put into operation for the permanent and final settlement of all questions about reconstruction. The bill was presented to Mr. Lincoln for his approval or disapproval just one hour before the adjournment *sine die* of Congress. He retained the bill without approval or disapproval, whereby it failed to become a law. Four days thereafter he issued his proclamation, in which he stated his failure to approve the bill, but he laid it before the people, as it contained the sense of Congress. He also stated that he was unprepared by formal approval of the bill to be inflexibly committed to any single plan of restoration, and was also unprepared to declare that the free State governments already adopted in Arkansas and Louisiana should be set aside and held for naught, or to declare the constitutional competency of Congress to abolish slavery in the States; yet he hoped that a constitutional amendment abolishing slavery would be adopted, and he continued, "Nevertheless, I am fully satisfied with the system for restoration contained in the bill as one very proper plan for the loyal people of any State choosing to adopt it." He stated that he was willing to aid such people "as soon as the rebellion shall have been suppressed in any State and the people thereof shall have been sufficiently returned to their obedience, in which cases Military Governors will be appointed with directions to proceed according to the bill."

To the Proclamation was appended a copy of the bill. There were differences between the President and Congress as to whether restoration was an executive or a legislative act. Mr. Lincoln in this proclamation solemnly asserts the executive power. He adopts the legislative plan, not because it was law, for it was not law, nor because Congress had power to make it law; but, on the contrary, he gives the plan its only operative force by adopting it as an executive measure; and

by substituting "military" for "provisional" Governor he made it distinctly and unequivocally an executive act. But whilst these differences existed, there was perfect agreement as to white suffrage, both Congress and the President agreeing that white suffrage alone was the only proper basis of political power in the Southern States. Congress had been vindictive indeed in several provisions of the bill,—in confining suffrage to white persons of undoubted loyalty, untainted with any previous sympathy with the rebellion, and excluding all others; in requiring that no restoration should take place until such persons should constitute a majority of the white male adults, and in the attempt to deprive of their citizenship in the United States the persons named in the fourteenth section; yet there was no evidence in any provision of the bill that persons of African descent were deemed fit depositaries of political power then or thereafter, or to be intrusted with the duties of citizenship; but the bill in the plainest and strongest terms affirmed the contrary. That was also the position of Mr. Lincoln. On this point there was no disagreement. As it eventuated, it was a serious misfortune to the whole country that Mr. Lincoln's scruples would not allow him to approve the bill. In case of approval, it might, and probably would, have turned out that reconstruction would have taken place under the terms of the bill. As it was, not one of the scruples that prevented his signing the bill was respected by any subsequent Congress. The free State governments of Louisiana and Arkansas, and even of Virginia, were overturned, and the power of Congress not only to abolish slavery in these States but to invest the slaves with the elective franchise was asserted and exercised.

If more proof be needed of the deliberate opinion and judgment of Congress as to the competency and unfitness of the Negro for citizenship and the impropriety of giving him the elective franchise, attention is called to the Act to enable Nevada to form a Constitution for admission into the Union, —an act, passed in the same year, 1864, in which suffrage was confined to whites,—and to the further fact that in pursuance of a Constitution so formed, which expressly confined suffrage to whites, Nevada was admitted by Proclamation of Mr. Lincoln on October 31st of that year,—1864. An enabling Act for Nebraska with similar provisions was passed

in the same year. Under that Act, in February, 1866, a Constitution was framed expressly confining suffrage to whites. After the controversy between President Johnson and Congress had grown bitter Congress admitted Nebraska, February 9, 1867, but with a condition that Negroes should be admitted to vote,—there being in the State just eighty-two persons of that class of all ages, sexes, and conditions, as was shown by the preceding census.

As further proof on this subject reference is made to the action of Congress in February, 1865, just on the eve of the collapse of the Confederacy, in proposing the Thirteenth Amendment. By this nothing more was claimed for the Negro than exemption from slavery.

Such was the position of the Federal Government as exemplified by the action of both executive and legislative departments in the most solemn public acts immediately preceding the final overthrow of the Confederacy. There was no hint that the Southern people on the surrender of their arms were to be subjected to the incompetent and corrupt government founded on Negro suffrage.

Such was the situation when the war ended.

Immediately on the final surrender of the Confederate armies, Mr. Lincoln having been assassinated but a few days prior thereto, President Johnson, following exactly the footsteps of Mr. Lincoln, appointed provisional governors for all the Southern States except Virginia, Arkansas, and Louisiana, in which loyal governments already existed. His requirements for reconstruction were the abolition and prohibition of slavery in those States, the ratification of the Thirteenth Amendment to the Constitution, and the repudiation of the State and Confederate debts created in aid of the rebellion. Under this proclamation the Southern States called conventions, made new Constitutions as required, and elected Senators and Representatives to the thirty-ninth Congress, which met on the first Monday in December, 1865.

When the final surrender came there was exhibited for the philosopher and the moralist a scene of the deepest interest,—a scene unparalleled in human affairs.

Eleven Southern States, once the proud equals of their co-States, and eight millions of Anglo-Saxon people who had never bowed their necks to a conqueror lay prostrate at the

feet of the victor. These States and this people, under difficulties that proved insurmountable, under trials and distresses that tested the manhood and constancy of the most heroic, had maintained their cause and their rights until further resistance was madness. These States had been overrun by invading armies; cities, towns, and villages had been destroyed, and houses that once had been the abiding place of elegance, wealth, culture, and refinement were now sad and silent. The bravest and best of the Southland filled unmarked graves on battlefields on which the grand heroism of a race, until then never subjugated, had been illustrated, or were left, bereft of all earthly possessions, to mourn over a defeat that no human skill, no human prowess, could have averted. With blighted hopes and crushed aspirations, they were brought face to face with that most terrible of all ordeals to freemen,—submission to the will, whatever it might be, of irresistible and irresponsible power. This situation was made even more bitter by the memory that they had once been equals in a proud republic. They were co-heirs with their conquerors of that rich heritage of self-government that had been won from a great power beyond the sea by their common efforts and common sacrifices.

Nor was the thought the less bitter because in that contest for independence and liberty these States had contributed the great statesman who had drafted the Declaration that justified resistance to wrong and the great captain without whose genius and patriotism the victory could not have been won. Then, after having successfully secured the rich blessings of independence and liberty to all sections, the South had contributed her full share to the inauguration of the government, in the framing of such policies and measures as had caused the very greatness and strength to which she was now the victim. A Southern statesman had placed the infant and weak Republic among the nations of the world, had guided it with such wisdom as to keep it from wreck, and had placed it on the footing that had presaged its future grandeur and power. After an interval of four years of another administration the people had again turned to the South for the statesmanship that was to secure prosperity at home and respect abroad, and had continued under that leadership for six Presidential terms.

And it must be remembered that the original limits of the Union were between the Atlantic and the Mississippi, the Lakes and the Gulf, with an important territory inside of these bounds still under foreign dominion; that it was through Southern statesmanship that this territory as well as the magnificent domain extending from the Mississippi to the Pacific Ocean, from the British dominions on the north to the Mexican Republic on the south, had been acquired, and that these extensions of territory had been bitterly opposed and denounced by the conquering section. From this added territory had come the power and the strength that had made the antagonists of the South irresistible.

LEGISLATIVE HISTORY OF RECONSTRUCTION

BOOK II

CHAPTER I

FIRST STEPS IN RECONSTRUCTION

THE war ended. The Thirteenth Amendment had passed Congress and had been submitted to the States for their action. The Southern States through their Legislatures, convened under President Johnson's scheme of reconstruction, had ratified the amendment and elected to Congress Senators and Representatives who had applied for admission to their seats. There had already appeared a divergence in the views of the Executive and Legislative departments, both as to the terms of reconstruction and as to which of these departments had the constitutional power to prescribe these terms. The President had followed the plan and adopted the constitutional views of his predecessor, Mr. Lincoln, which would have reconstruction as the result of Executive action. Congress insisted on their jurisdiction in the matter. Early in the first session of the thirty-ninth Congress a concurrent resolution was passed by the Senate and the House, by which a mutual pledge was given that neither House would admit representatives of the Southern people or of the States, except in pursuance of the joint action of both.

A joint committee on reconstruction was organized, to which all propositions looking to reconstruction of the Southern States were to be referred.

Then came from members of the dominant party numerous propositions looking to reconstruction. It is wholly unnecessary to set out all these propositions, except to say that they all looked to a diminution of the political power of the Southern States. As universal emancipation had already been accomplished by the ratification of the Thirteenth Amendment, it was clear that under the Constitution as it then stood there would be a large increase in the political power of the Southern States, both in the House of Representatives and in the Electoral College; the three-fifths representation of slaves

had failed for want of subjects to operate on, and in lieu of it had come a full representation of all persons of African descent. There were those who desired by national action to confer on persons of African descent the elective franchise, but they were in a small minority. But there seemed to be no dissent to the proposition that if they were not allowed to vote in the Southern States,—that if they were disfranchised in the South as they were in nearly all the Northern States,—it would be unjust to admit them as elements of political power in the Southern States where they resided in large numbers. The effort was to effect this diminution without at the same time recognizing by national law the unfitness of the freedmen for the discharge of political duties.

A representative proposition is that offered by Senator Wilson, of Massachusetts, as an amendment to the Constitution. It was offered on April 27, 1866. It contained the following provisions:

1. Prohibition against the United States or any State making payment for emancipated slaves, or of any debt contracted in aid of the rebellion.

2. Following the Constitution as to apportionment of Representatives in Congress according to population, it provided that when in any State the elective franchise is denied to any male citizen of the United States above twenty-one years of age, for any cause except for insurrection or rebellion against the United States, there should be a reduction in the basis of representation of such State in the proportion that such male citizens so excluded bear to the whole number of males in the State over twenty-one years of age.

Section two of the bill provided that whenever any one of the insurrectionary States should ratify the above provisions, Senators and Representatives should be admitted from such States as if they had been elected from States that had never been in insurrection.

Many propositions of similar import to amend the Constitution, propositions that were designed to reduce the representation of the Southern States if Negroes were excluded from voting, were presented in both Houses,—by Messrs. Sumner, Dixon, and Grimes in the Senate, and by Messrs. Schenck, Thaddeus Stevens, Broomall, and Pike in the House.

On January 22, 1866, Mr. Stevens, from the joint committee on reconstruction, reported favorably House Bill No. 51, apportioning representatives and direct taxes according to population; but with a proviso that if suffrage be denied or abridged in any State on account of race, color, and so on, then such race should be excluded from the basis of representation of such State.

On reporting this bill, Mr. Stevens said: "There are twenty-two States whose Legislatures are now in session, some of which will adjourn within two or three weeks. It is very desirable, if this amendment is to be adopted, that it should go forth to be acted upon by the Legislatures now in session. . . . It does not deny to the States the right to regulate the elective franchise as they please; but it does say to a State: 'If you exclude from the right of suffrage Frenchmen, Irishmen, or any particular class of people, none of that class of persons shall be counted in fixing your representation in this House. You may allow them to vote or not, as you please; but if you do allow them to vote, they will be counted and represented here; while, if you do not allow them to vote, no one shall be authorized to represent them here.' " [1]

Mr. Wilson, of Iowa, said that the Judiciary Committee of the House had had the same subject under consideration, and had, after careful consideration, reached the same conclusion. It is thus seen that these two great committees after careful consideration, separate from and independent of each other, had reached the conclusion that the right to control and regulate suffrage was to remain with each State, but if any State should restrict it on account of race or color, then such restriction should operate to diminish *pro tanto* the political power of the State in Congress and in the Electoral College. The idea that the regulation of suffrage to any extent should be assumed by the General Government was expressly repudiated. The proposition was to diminish the political power of the Southern States unless they provided for Negro suffrage.

Mr. Conkling made this view very evident in the remarks he submitted in favor of the report of the committee. He argued that unless the report of the committee was made a

[1] *Congressional Globe*, 39th Congress, 1st Session, Part I, p. 351.

part of the Constitution, a given number of whites in Mississippi would have three votes to one for the same number of whites in New York. To remedy this, he said, there were three methods:

1. To make the qualified voters in each State the basis of representation.

2. To prohibit the States from discriminating as to suffrage on account of race or color.

3. To leave the States to decide for themselves who were fit for suffrage; and if a class be adjudged unfit, then to exclude that class from representation.

Proceeding to argue these propositions, Mr. Conkling said: "The second plan mentioned, the proposition to prohibit States from denying civil or political rights to any class of persons, encounters great objection on the threshold. It trenches upon the principle of existing local sovereignty. It denies to the people of the several States the right to regulate their own affairs in their own way. It takes away a right which has been always supposed to inhere in the States and transfers it to the General Government. It meddles with a right reserved to the States when the Constitution was adopted, and to which they will long cling before they surrender it. No matter whether the innovation be attempted in behalf of the Negro race or any other race, it is confronted by the genius of our institutions. But more than this. The Northern States, most of them, do not permit Negroes to vote. Some of them have repeatedly and lately pronounced against it." [1]

There seems to have been some difficulty as to fixing a different basis for representation and for direct taxation. So the proposition was recommitted and on January 31st it was again reported from the Committee on Reconstruction with the words "direct taxes" stricken out.

Mr. Schenck (from Ohio) moved an amendment to the effect that representation should be based on an enumeration of the legal voters for the most numerous branch of the State Legislature of each State.[2]

This proposition, whilst it equally struck at the political power of the Southern States, as did the measure of the com-

[1] *Globe*, 39th Congress, 1st Session, p. 358.
[2] *Ibid.*, p. 535.

mittee, was supposed to increase the political power of the West as compared with the East. This contest between the East and the West will appear very distinctly hereafter.

Mr. Stevens, in support of the proposition of the committee, among other things said: "Now I hold that the States have the right, and always have had it, to fix the elective franchise. . . . And I hold that this does not take it from them. Ought it to take it from them? Ought the domestic affairs of the States to be infringed upon by Congress so far as to regulate the restrictions and qualifications of their voters? How many States would adopt such a proposition? How many would allow Congress to come within their jurisdiction to fix the qualifications of their voters? Would New York? Would Pennsylvania? Would the Northwestern States? I am sure not one of them would. Therefore, if you should take away the right which now is and always has been exercised by the States, by fixing the qualification of the electors, instead of getting nineteen States, which is necessary to ratify this amendment, you might possibly get five. I venture to say you could not get five in this Union." [1]

Mr. Stevens continued: "Now, any man who knows anything about the conditions of aspiration and ambition for power which exists in the slave States knows that one of their chief objects is to rule this country. It was to ruin it if they could not rule it [*sic*]. They have not been able to ruin it, and now their great ambition will be to rule it. If a State abuses the elective franchise and takes it from those who are the only loyal people there, the Constitution says to such a State, 'You shall lose power in the halls of the nation, and you shall remain where you are, a shriveled and dried up nonentity instead of being the lords of creation, as you have been, so far as America is concerned, for years past.' Now, sir, I say no more strong inducement could ever be held out to them, no more severe punishment could ever be inflicted upon them as States. If they exclude the colored population they will lose at least thirty-five representatives in this Hall. If they adopt it they will have eighty-three votes. Take it away from them and they will have only from forty-five to forty-eight votes, all told, in this Hall; and then, sir, let them

[1] *Globe*, 39th Congress, 1st Session, p. 536.

have all the copperhead assistance they can get, and liberty will still be triumphant." [1]

Mr. Stevens, in the same speech, in urging several objections to the amendment offered by Mr. Schenck, fixing representation on the basis of the number of electors for the most numerous branch of the Legislatures of the several States, said: "There are fifteen or twenty Northern representatives that would be lost by that amendment and given to the South whenever they grant the elective franchise to the Negro." [2]

From these extracts from the debates it is made evident that whatever may have been the private wishes of some of the members as to the propriety of Negro suffrage its enforcement on the South by Federal power met with little favor, even in the House. There was still less for it among the people themselves. Mr. Stevens, whose sympathy for such enforcement at some time was not concealed, declared that the proposition would not receive the support of five States in the Union. This was about one year after the surrender at Appomattox, so that if Negro enfranchisement was, indeed, one of the ends for which the war was fought, such end was condemned by the almost unanimous judgment of the Northern people themselves.

It will be noted also that in the amendment, as reported by the Reconstruction Committee, even so far as the conquered States of the South were concerned, the proposition was not to enforce Negro suffrage, but only to curtail their representation if suffrage was not conceded to the Negro. This curtailment was advocated because it was a severe punishment to the Southern States.

But especial attention is called to the opposition to the enforcement of Negro suffrage by Federal law as expressed by Mr. Conkling. He declared that such enforcement would trench upon the principle of local sovereignty in the States, deny their right to manage, as they always had, their domestic affairs in their own way, a right which had always been supposed to inhere in the States, which was reserved to them when the Constitution was formed, and to which they would long cling. Finally, he declared that it would be an in-

[1] *Globe*, 39th Congress, 1st Session, p. 536.
[2] *Ibid.*, p. 537.

novation that was "confronted by the genius of our institutions."

The proposed amendment to the Constitution passed the House of Representatives as it had been reported by the Committee.

When the question came up in the Senate, Mr. Sumner opposed the amendment in an elaborate speech of very great ability, contending, among other things, that the amendment proposed by the committee conceded to the States the power to disfranchise Negroes, a power that they did not then have under the Constitution.

Mr. Fessenden, the Senate Chairman of the Joint Reconstruction Committee, replied; and whilst confessing his sympathy to some extent with Mr. Sumner's views, he yet supported the proposition of the committee, arguing against an amendment to the Constitution prohibiting discrimination as to Negro suffrage on account of race and so on. He said: "It would place the States which have recently been slave States in this condition, that they must either limit the suffrage too far, or they must extend it too far for their own safety, or, at any rate, for what might be presumed to be their own good. I take it no one contends,—I think the honorable Senator from Massachusetts himself, who is the great champion of universal suffrage, would hardly contend, —that now at this time the whole mass of the population of the recent slave States is fit to be admitted to the exercise of the right of suffrage. I presume no man who looks at the question dispassionately and calmly could contend that the great mass of those who were recently slaves (undoubtedly there may be exceptions) and who have been kept in ignorance all their lives, oppressed, more or less forbidden to acquire information, are fit at this day to exercise the right of suffrage, or could be trusted to do it, unless under such good advice as those better able might be prepared to give them." [1]

Mr. Fessenden, in another part of his speech, declared that it could not be put out of sight that slavery had existed from the foundation of the Government and that it had been abolished within one or two months, and "that there are left in several of the States of the Union a large number of persons ignorant and uneducated, who, up to a very recent

[1] *Globe*, 1st Session, 39th Congress, p. 704.

period, have been held in bondage, considered by the Constitution itself as entirely unfit to be counted as a part of the people of the United States and represented as a whole." [1]

So far Mr. Fessenden, in arguing against a proposition, in substance the same as the Fifteenth Amendment, whilst confessing his sympathy for it, contented himself with stating the very serious objection that the great mass of the Negroes were wholly unfit for suffrage, and that such an extension would go too far for the safety of the Southern States. He confessed that this answer that he had made did not satisfy himself. Proceeding, he said: "But the argument that addressed itself to the committee was, what can we accomplish? What can pass? If we report a provision of this kind [in substance the Fifteenth Amendment] is there the slightest probability that it will be adopted by the States and become a part of the Constitution of the United States? It is perfectly evident that there could be no hope of that description. . . . I might appeal to the vote which was taken in one of our New England States [Connecticut], rejecting a proposition which proposed to do away with all distinctions between men on account of color. . . . We must take men as we find them." Speaking of the opposition of the States to such an amendment, he said: "It would be a mere idle proposition, one that would not commend itself to anybody, not in the first place to Congress itself, and not in the second place to the States themselves." [2]

Here, by one of the great leaders of Northern sentiment, one who sympathized with the view that Negroes ought to be admitted to suffrage, was declared in the most emphatic manner:

First. The unfitness of the Negro for the exercise of political rights.

Second. That Negroes were considered by the Constitution of the United States as entirely unfit to be counted a part of the people of the United States as a whole.

Third. That a proposition to enfranchise them could receive neither the assent of Congress nor the ratification of the people of the States.

Mr. Sumner saw a way to dispense with the two-thirds

[1] *Globe,* 1st Session, 39th Congress, p. 703.
[2] *Ibid.,* p. 704.

vote of Congress required in passing an amendment to the Constitution, and also to dispense with the action of the States. As before stated, he held that the power already existed in Congress to enfranchise the Negro. So he proposed as a substitute for the proposed amendment recommended by the committee the following as a statute:

"That in all the States lately declared to be in rebellion there shall be no oligarchy, aristocracy, caste, or monopoly invested with peculiar privileges and powers, and there shall be no denial of rights, civil or political, on account of color or race, but all freemen shall be equal before the law, whether in the court room or at the ballot box; and this statute made in pursuance of the Constitution shall be the supreme law of the land, anything in the Constitution and laws of any such State to the contrary notwithstanding." On this proposition of Mr. Sumner, which it will be noted applied only to the Southern States, the ayes were eight,—Brown, Chandler, Howe, Pomeroy, Sumner, Wade, Wilson, and Yates,—and the nays thirty-nine.

Mr. Sumner then moved an amendment to the proposition reported by the committee in these words: "And the elective franchise shall not be abridged in any State on account of race or color." For that the same eight senators voted; the remainder who were present, thirty-eight, voted in the negative.

These two votes show the strength at that time of the proposition to enforce Negro suffrage by Federal action. There were eight senators who voted to enforce Negro suffrage on the Southern States alone, as was the proposition in Mr. Sumner's amendment; and the same eight, being defeated in that, were willing to impose it on all the States, by an amendment to the Constitution.

The proposition reported by the committee to amend the constitution failed to pass the Senate. Ayes, twenty-five; nays, twenty-two; two-thirds not voting for it. A motion to reconsider was made and sustained, but no final action was ever afterward taken on it.

Thus ended the first effort to amend the constitution as one of the prerequisites of reconstruction.

In the meantime there were several propositions to impose Negro suffrage on the South, leaving the Northern States

free to act upon that subject as they deemed proper for their own interest. In fact, as has been shown, the Northern States except some States in New England were bitterly opposed to admitting Negroes to a share of political power within their respective limits. They were even opposed to the immigration and settlement within their borders of persons of African descent. Yet there was a strong feeling that such suffrage should be imposed on the South. In many instances this feeling had for its foundation the desire to inflict it as a punishment on the Southern States, as is shown in the extract from Mr. Stevens' speech. The conviction was not uncommon among those favoring Negro suffrage that they were unfit for the exercise of political power to an extent that rendered their enfranchisement unsafe to the Southern States. (See Mr. Fessenden's speech above.)

One of the most important of the propositions to impose Negro suffrage on the South alone was a resolution [1] that was introduced into the Senate by Mr. Wilson, of Massachusetts, on March 5, 1866.

The resolution provided that each of the ten insurrectionary states (omitting Tennessee) should be entitled to representation in Congress and to resume complete practical relations with the United States whenever its Legislature should adopt the following irrepealable fundamental conditions:

1. That all laws, statutes, and ordinances heretofore in force in such State requiring inequality in civil rights among its inhabitants founded on distinctions of race, color, or descent, or previous condition of servitude, be declared null and void; and declaring also that it shall be forever unlawful to make or enforce such laws, statutes, and ordinances.

2. There shall be no discrimination in civil rights on account of color, race, descent, or previous condition of servitude; but all inhabitants shall have the same right to make and enforce contracts, to sue and to be parties, give evidence in all courts and causes, to inherit, purchase, lease, sell, and convey real and personal estate, and shall have the full and equal benefit of laws for the protection of person and property, and be subject to the same penalties and punishments, and none other.

[1] S. R. No. 37, 39th Congress, 1st Session.

3. The right of voting for President, Vice-president, Representatives in Congress, and members of the State Legislatures shall be granted to the following persons of African descent: A. Males over twenty-one years of age enrolled in the army or navy of the United States. B. Also those who pay a tax on real or personal property, or who are able to read the Constitution of the United States, and who possess the other qualifications required by the Constitution of the States not inconsistent herewith.

4. Repudiation of the debt contracted in aid of the rebellion and a release of all claims for emancipated slaves.

These were made irrepealable under any circumstances whatever.

In this scheme of reconstruction it will be noted that the legality of the Southern States Governments was fully recognized, as the adoption of those important provisions was left to their several Legislatures as then organized. It will be further noted that the elective franchise was only to be granted to persons of African descent who were duly enrolled in the United States army or navy, or who owned real or personal property on which they paid taxes, or who could read the Constitution of the United States. Even Mr. Wilson shrank from imposing on the Southern States suffrage for the large mass of ignorant voters of the African race, whose enfranchisement Mr. Fessenden had stated could not take place with safety to the Southern States. The enfranchisement provided for was only partial and incomplete. It extended only to voting for such offices as related particularly to the political power the State should exercise under national government,—that is, to the election of President, Vice-president, and Representatives in Congress, and to that State organism that had the power to elect Senators in Congress. As to all officers whose functions related exclusively to the internal and domestic administration of the State government, each State was left free to decide by whom they should be elected.

Eleven days after this, on March 16th, and after the failure in the Senate of the first reconstruction amendment to the Constitution, as reported by the joint Committee on Reconstruction and passed by the House of Representatives, Mr. Stewart, of Nevada, introduced a joint resolution for

reconstruction.[1] This, like Mr. Wilson's, did not contemplate an amendment of the Constitution of the United States, but proceeded on the idea that its passage was within the power of Congress.

The resolution provided for a full resumption of the Federal relations of any insurrectionary State whenever such State should provide by an amendment of its Constitution for the full civil rights of Negroes, repudiate its rebel debt, surrender all claim to compensation for emancipated slaves, and provide for the extension of the elective franchise to all males twenty-one years old, without distinction as to color, race, and so on. In this it will be again seen that the State Governments then existing in the South were accepted as competent to discharge the highest political duties and fully invested with all powers belonging normally to State governments; and so strong was this conviction in the mind of the author of the resolution that in another part it was provided that the ratification of the amendment to the State Constitution should be by a majority of the voters as they were defined by law in the year 1860.

So strong, however, was the feeling against this assumption of power by the Federal Government to regulate or in any way interfere with the franchise in the Northern States that it was stated in the third resolution that, in view of the importance of thorough assimilation of the basis of suffrage in all the States, the other States were requested to amend their Constitutions in accordance with the above resolutions. But lest this mere request,—so sensitive were the Northern States on this subject,—should be construed to mean an assumption of power over the franchise in the States by the Federal Government, a fourth resolution was appended.

This fourth resolution declared that in adopting the foregoing it was not intended to assert a coercive power in regard to the regulation of the right of suffrage in the different [*sic*] States of the Union, but only to make a respectful and earnest appeal to their own good sense and love of country, with a view to the prevention of serious evils then threatened and to the peaceful perpetuation of the repose, the happiness, and true glory of the American people.

[1] S. R. No. 48, 39th Congress, 1st Session.

On April 6th Senator Lane, of Kansas, offered a resolution for reconstruction which, so far as suffrage was concerned, required the Southern States to provide for the right to vote of colored males over twenty-one years old who could read the Constitution of the United States in the English language and write their names, and also of those who owned $250 worth of real estate and paid taxes thereon.

These facts will suffice to show how deep was the conviction that it would not do to interfere with suffrage in the Northern States, and also how even the most radical anti-slavery Senators shrank from propositions to enforce universal Negro suffrage even in the South, for they required educational or property qualifications for such voters in the South.

CHAPTER II

THE FOURTEENTH AMENDMENT

On April 30, 1866, the Joint Committee on Reconstruction, after a full consideration of all the various propositions and after a discussion of the subject by both Houses that occupied the greater part of four months, reported a proposition to amend the Constitution,—a proposition that was the basis of the Fourteenth Amendment as it now exists.

The first section of this proposition is the first section of the Fourteenth Amendment as it now stands, except that it did not contain the first clause, which defines citizenship.

The second section is the same as the second section of the Fourteenth Amendment, except that it used the words "elective franchise" instead of "the right to vote" for the officers specifically named in that section of the Fourteenth Amendment.

The third section, as proposed by the committee, disfranchised until the 4th of July, 1870, all persons who voluntarily aided in the rebellion from voting for electors for President, Vice-President, and representatives in Congress. As it now stands it contains a disfranchisement from holding office but says nothing as to suffrage.

The fourth section as proposed is as it now stands, except that it did not contain the provision about the inviolability of the public debt.

The fifth section is the same as the fifth section as it now stands.

It will be noted that as to Negro suffrage the provision was the same as in the first report of the committee on reconstruction before noticed,—a provision that passed the House and failed in the Senate. The provision merely diminished the representation in Congress of any State excluding Negroes from suffrage.

It is now seen clearly what was the final judgment of the

committee, after months of consideration, on the subject of the elective franchise,—a judgment that was ratified by Congress. On this point the proposition was that if any State should exclude Negroes, or in fact any male citizen of the United States twenty-one years old, from suffrage except for participation in rebellion or other crime, there was to be a proportionate reduction in its representation in Congress.

In this it is seen how carefully Congress guarded against an infringement of the right of each State to regulate the franchise within her borders, how scrupulously it respected what Mr. Conkling had denominated "the genius of our free institutions," how vigilant it was that nothing should be inserted that would diminish essentially the power of any Northern State. It had been ascertained in debate that some of the Northern States allowed aliens to vote on a mere declaration of intention to become citizens and that in others the franchise was confined to citizens. So when it was proposed to apportion representation according to the number of actual voters, it was objected that this would operate to diminish the power of those States that had a large foreign population not yet naturalized and that confined suffrage to citizens. So also in framing the amendment it was arranged that whatever rule a State should prescribe on this subject, it should not affect her political power.

THE BILLS ACCOMPANYING THE AMENDMENT

At the same time that this proposition for the amendment of the Constitution was reported by the committee they also reported two other bills on the subject of reconstruction.

One of these was entitled "A Bill to Restore the States Lately in Insurrection to their Full Political Rights." The preamble declared, "It is expedient that the States lately in insurrection shall at the earliest day consistent with the future peace and safety of the Union be restored to full participation in all political rights," and it then recited the submission by Congress of the Fourteenth Amendment and copied it in full, as proposed by the committee.

The bill then enacted that whenever the said proposed amendment should have become a part of the Constitution of the United States, and any of such insurrectionary States

should have ratified the same and should have modified its Constitution and laws in conformity therewith, the Senators and Representatives from such State, if found duly elected and qualified, might, after having taken the required oath of office, be admitted into Congress as such.

The second section of the bill, as a further inducement to the Southern States to ratify the amendment, offered to any State so ratifying it permission to assume its share of the direct tax levied in 1861, and gave ten years for the payment of that tax.

The other bill disfranchised from holding office under the United States the following classes:

1. The President and the Vice-president of the Confederate States and the heads of Departments.

2. The agents of the Confederate States in foreign countries.

3. The Heads of Departments of the United States, the officers of the Army and Navy, those educated at the military and naval academies, Judges of United States Courts, and members of either House of the Thirty-sixth Congress who gave aid and comfort to the rebellion.

4. The officers of the Confederate States above the grade of Colonel in the Army, or Master in the Navy, and any one who, as the Governor of any of the said States, gave aid and comfort to the rebellion.

5. Those who treated captured officers or soldiers or sailors of the United States otherwise than lawfully as prisoners of war.

These measures on their face indicated in the plainest terms the final determination of the party in power, as represented by the joint Committee on Reconstruction, as to what terms were to be exacted of the Southern States as the conditions of restoration to a full participation in all political rights. In these States there were then fully organized State governments acknowledging the supremacy of the Constitution and the laws of the United States and exercising all the powers of State governments, with all officials sworn to support the Constitution. In all these States slavery had been abolished by amendments of their Constitutions, and this abolishment had also become national by the ratification of the Thirteenth Amendment. This amendment had become

operative by the action of the Legislatures of these States and had been so accepted by the Federal Congress. The State governments as thus organized had, therefore, been recognized as lawful governments, capable of performing the highest and most solemn acts of State sovereignty, and participating in the amendment of the Constitution of the United States itself. They passed laws upon all subjects of State jurisdiction, and exercised all the reserved rights that belonged to any State of the Union. The Federal Government in turn recognized them fully as States. The Circuit and District Courts of the United States were regularly held in each of them, exercising the powers not of territorial United States Courts, but the powers that could only be exercised by the Courts of the United States held in States. The only point on which there was a difference was that the two Houses, by a concurrent resolution, had agreed with each other that neither of them would admit Senators and Representatives from any of these States without the consent of the other. The resolution is as follows:

"That in order to close agitation upon a question which seems likely to disturb the action of the Government, as well as to quiet the uncertainty which is agitating the minds of the people of the eleven States which have been declared to be lately in insurrection, no Senator or Representative shall be admitted into either branch of Congress from any of said States, until Congress shall have declared such States entitled to such representation."

Article I, Section 3, of the Constitution reads: "The Senate of the United States shall be composed of two Senators from each State. . . ."

Article V of the Constitution declares: "No State without its consent shall be deprived of its equal suffrage in the Senate."

It will be noted also that this amendment,—the Fourteenth,—was proposed for ratification to the governments then existing and as then organized in the States, whereby their competency to perform this great act of political sovereignty was again recognized. It will be noticed further that there is not a word in the bills that in the slightest degree implied that these State governments were illegal or provisional in any sense. They were not even called "insurrec-

tionary" States or "States in insurrection." They were designated as "States lately in insurrection,"—that is, States in which there had been, but no longer was, an insurrection. As to the powers of these States there is not a single word. The preamble recites that it is expedient that they should be restored to full participation in all political rights, not that they had lost or forfeited any rights whatever. The main condition of this restoration was the performance of an act that could only be performed by a State in the Union that possessed all the powers and faculties of any other State,—to wit, ratification of an amendment to the Constitution of the United States.

It is needful now to set out some of the debate,—the expressions of the most eminent Northern Republicans,—explanatory of the purpose of these bills.

Mr. Stevens, referring to the proposed Constitutional amendment, said that it was not all that the committee (on reconstruction) desired. "It falls far short of my wishes," said he, "but it fulfills my hopes. I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted." In this he referred to the Northern States, for he said: "I utterly repudiate and scorn the idea that any State not acting in the Union is to be counted in the question of ratification." [1]

General N. P. Banks, speaking for the proposition and giving his reasons for supporting it, notwithstanding the failure to provide for Negro suffrage, said:

"We have, in the nature of our Government, the right to do it [that is, impose Negro suffrage]; but the public opinion of the country is such at this precise moment as to make it impossible we should do it." [2]

General Garfield said: "I regret . . . . that we have not found the situation of affairs in this country such, and the public virtue such, that we might come out on the plain, unanswerable proposition that every adult intelligent citizen of the United States, unconvicted of crime, shall enjoy the right of suffrage." [3]

He further said: "I believe that suffrage is the shield,

[1] *Globe*, 1st Session, 39th Congress, p. 2459.
[2] *Ibid.*, p. 2532.
[3] *Ibid.*, p. 2462.

the sword, the spear, and all the panoply that best befits a man for his own defense in the great social organism to which he belongs. And I profoundly regret that we have not been able to write and engrave it upon our institutions, and imbed it in the imperishable bulwarks of the Constitution." [1]

These extracts taken from the speeches of the most eminent men who favored Negro suffrage sufficiently show that in their judgment neither Congress nor the general mass of the American people believed in the propriety of imposing Negro suffrage on the South, or that its imposition was one of the logical results of the war.

Mr. Stevens did not believe that the ratification of the Southern States was necessary in the adoption of the amendment, it is true. But this opinion, it will be hereinafter shown, was not concurred in by Congress. Nor did he see proper to explain why they were required to perform an act for which they were not competent under the Constitution,—that is, should violate the Constitution itself,—in order to secure recognition from Congress of their undoubted constitutional rights of representation. As indicative of the feeling of bitter hostility and intense hatred entertained by the most conservative members of the Republican party, and of the design to humiliate the Southern people by requiring them to indorse measures intended to dishonor them, attention is called to the action of General Garfield. He was not content with the disfranchisement of the Southern people until July 4, 1870, as provided for in the amendment as proposed by the committee. He proposed an amendment to this that would have the effect of disfranchising them forever. And, speaking in favor of the disfranchisement as expressed by the committee, he said: "Anything is just which excludes from privilege and power all those infamous men who participated in rebellion." [2]

On May 10, 1866, under the operation of the previous question, the resolution proposing the Fourteenth Amendment passed the House by a vote of one hundred and twenty-eight yeas to thirty-seven nays, nineteen members being absent.[3]

[1] *Globe,* 1st Session, 39th Congress, p. 2462.
[2] *Ibid.,* p. 2463.
[3] *Ibid.,* p. 2545.

In the Senate it was found difficult to secure a two-thirds majority on any precise form for the amendment. There were various views presented. Mr. Sherman especially favored a proposition to amend offered by Mr. Doolittle,—a proposition to the effect that representation should be according to the number of legal voters in each State. This was bitterly resisted by the Senators from the Eastern States on the ground that emigration from those States to the West had occasioned an undue proportion of males in the Western States, and a consequent lessening of their numbers in the East, and that, therefore, the proposition would give the West undue influence and power in the Government.

Mr. Wilson, of Massachusetts, opposed the proposition with great vigor, saying he regarded it as a "proposition to strike from the basis of representation 2,100,000 unnaturalized foreigners in the old free States, for whom we were now entitled to seventeen Representatives in the other House." [1] He insisted that the proposition as advocated by Mr. Sherman weakened the East that much, and was simply a blow to strike that number of representatives from the loyal portion of the country for the benefit of the disloyal portion.

It being impossible for the Republican Senators to agree, resort was had to caucus, in which the exact phraseology of the amendment was agreed to. In obedience to the decision of the caucus, Mr. Sherman voted against the proposition he had so strenuously advocated. In giving his reasons for doing so, he said the vote he would cast would be "in opposition to what is my deliberate judgment on the question now pending. The more I think upon this question the more I am convinced that the true basis of representation in the present condition of affairs is the number of male citizens who under the laws of the States are allowed to vote. . . . I feel bound by the action of my political friends to vote against this amendment . . . . offered by the Senator from Wisconsin [Mr. Doolittle], though in my judgment it would do more than any other to heal the difficulties by which we are surrounded." [2]

Mr. Stewart, also, did not approve the plan as agreed on in caucus.

[1] *Globe*, 1st Session, 39th Congress, pp. 2986-7.
[2] *Ibid.*, p. 2986.

It is thus seen that in this most important measure,—the amendment of the Constitution of the United States, by which the destiny, the happiness, and the welfare of the Southern States were most deeply affected, and about which they were not consulted, and on which they were not allowed to be heard even,—the independent judgment of Senators was controlled and their action dictated by a party caucus.

The whole scheme was opposed in the most able speeches. Mr. Hendricks said:

"And now, sir, in this the most unsafe period of our history, when the passions excited by the war are yet fierce; when sectional controversies run high, and party strife is raging; when eleven States are absent from this chamber, and other sections, seizing the opportunity, seek to aggrandize their power, and to fasten upon the country a partial and unequal policy; when the lust for power and gain carries men beyond the restraints of justice and right; at such a time I cannot remain wholly silent when I see the hand of the partisan and the self-constituted reformer laid upon the sacred work of the fathers. In such a case, to speak is a man's duty, though none may heed." [1]

This eminent statesman, finding this grave matter settled in the caucus of the majority, and knowing that all argument against the decree of the caucus would be vain, though determined to do his duty, was compelled to confess the difficulty of speaking "when," to use his own language, "one knows in advance that no argument, however just and forcible, and no appeal, however patriotic, can influence a single vote; that the authority and law of a political party is over every Senator of the majority, and that it remains now only to register the decree of the secret caucus." [2]

Mr. Hendricks, speaking further of the reports of the Reconstruction Committee, said that its first report, made some months before, had been defeated. "Its second report is now upon our desks. It passed the House, but when it came under discussion in the Senate, and had to bear the test of the independent judgment of Senators, it was found wanting, and its defeat became almost certain. A second defeat to a party programme could not be borne; its effect upon the fall

[1] *Globe,* 1st Session, 39th Congress, p. 2938, June 4, 1866.
[2] *Ibid.*

elections would be disastrous. A caucus was called, and we witnessed the astounding spectacle of the withdrawal, for the time, of a great legislative measure, touching the Constitution itself, from the Senate, that it might be decided in the secret councils of a party. For three days the Senate chamber was silent, but the discussions were transferred to another room in the Capitol, with closed doors and darkened windows, where party leaders might safely contend for a political and party policy." [1]

Mr. Cowan, of Pennsylvania, spoke with great force and eloquence against the proposed amendment. He said: "If a State has the right to form its own government, and that is the republican form, by what right can one of the other States, or two of them, or ten of them, or three-fourths of them, if you please, venture to introduce into the State a power from without in order to control its distribution of political power? If the effect of any such extra action upon a State would be to deprive it of a portion of its weight in the Union, that is a violation of the original compact; it is a violation of the very instrument upon which the Union was formed; it is putting the torch to the very fabric you wish to preserve; it is putting a mine under the very building you wish to secure." [2]

He further said: "What is worse about it all, those States which are to suffer most and the States in which it is to operate most harshly are not heard; they are not allowed to come upon the floor and argue their case." [3]

Speaking of Negro suffrage that was to be brought about by a reduction of the representation of the Southern States in case Negroes were excluded from voting, he asked:

"Do you pretend that you are improving the suffrage, do you pretend that you are making the institutions of the country more secure when you insist upon this? Who does so in the face of the civilized world? Are you bringing into the councils of the country more wisdom, more independence, more virtue? Nobody pretends it. Do you allow Negroes to vote yourselves? . . .

"Degrade your franchise, put it down in the hands of men

[1] *Globe,* 1st Session, 39th Congress, p. 2938.
[2] *Ibid.,* p. 2987.
[3] *Ibid.,* p. 2988.

who have no intelligence, no virtue, and, what is worst of all, no independence; put it into the hands of men who have nothing to hope from it except in so far as they can use it for corrupt purposes, and shall we be safer then, I ask? Do you suppose that the people of the States in which there are Negroes will send more intelligent, more learned, more virtuous, and more independent Senators and Representatives here, if you make this change, than they would without?" [1]

Mr. Wilson interjected: "They will send more loyal men." [2]

Again Mr. Cowan said: "If we are to amend the Constitution, we must amend it in such a way as to be satisfactory to the people everywhere, not merely the people of Massachusetts, or the people of Michigan, but to the people of Georgia and the people of Louisiana, to the people of all the States. Does any man want an amendment to the Constitution forced through here under circumstances of this kind, against a people who are unable to resist, against people whom you will not hear, and in the face of a numerical majority in the country against you?" [3]

Notwithstanding all arguments to the contrary, the Fourteenth Amendment passed the Senate, after having been amended so as to be as it now is, and was then passed in the House and filed in the Secretary of State's office on June 16, 1866. No serious efforts were made to pass the bills that accompanied it, and that were the complements of the Fourteenth Amendment in the then scheme of reconstruction.

The Southern States had not been heard in Congress on this amendment. They had not been allowed to participate in framing it as a proposition to be submitted to all the States, though, as was afterward assumed, they, as the final actors under the Constitution, were required not to exercise their judgment and ratify or reject as they might deem best, but were forced to ratify it. There was a command from a portion of the States to another portion that the latter should ratify this amendment, or be subject to the consequences, whatever they might be. In effect, Congress not only exercised the power granted by the Constitution to formulate an

[1] *Globe*, 1st Session, 39th Congress, p. 2989.
[2] *Ibid.*, p. 2989.
[3] *Ibid.*, p. 2989.

amendment to the Constitution, and propose it to the constituent bodies, the States, but, as to the Southern States, dictated that it should be accepted.

It must not be forgotten that this proposition was submitted to the Southern State governments as they then existed. Who was to exercise the ratifying power in a State was, in the Southern, as it was in the Northern, left to each State for its sole determination. It was not even hinted that Congress would reorganize any State government, introduce new electors, exclude electors qualified by the Constitution and laws, and to this new body submit the proposition of amendment. As Congress had failed to pass the accompanying bills before noticed, there remained no promise or engagement, as was contained in them, that if the Southern States would ratify the proposed amendment they would be allowed representation in Congress.

The Southern States declined to ratify, as might have been expected. The proposition to amend had been made purposely offensive to the Southern people, as it required them "to put," in the language of Mr. Trumbull, "some sort of stigma, some sort of odium, upon the leaders of the rebellion."

The Southern people had been engaged in a war that had taxed their endurance and patriotism to the last degree. They had continued the struggle as long as there was hope, and even beyond the time when calm and unimpassioned men saw there was no hope of success. They had staked all on the result and had lost. Their fields had been laid waste, their homes had been pillaged and burned, and many of their bravest and best men had sealed their devotion to the cause by yielding up their lives. There was scarcely a family in all the South that had not lost in the struggle at least one of its members. In fact, all was lost save honor.

The Southern people had entered into the struggle with the profound conviction that separation and independence were necessary to their safety. When, therefore, they had failed, it was not a matter of reproach, but to their honor that they did not purchase immunity from threatened wrong by sacrificing a portion of their brethren upon an altar of infamy.

If the Fourteenth Amendment had contained nothing but

the guarantee for personal rights, as stated in the first section, and the provision for the national debt and for the repudiation of the Confederate debt, and the yielding of compensation for emancipated slaves, and the reduction of representation of Southern States in Congress, it is highly probable that the Southern people would have accepted it as the final terms of reconstruction, if it had been so proposed.

The loss of political power that was threatened unless Negro suffrage was adopted would not of itself have proved a serious objection. Looking at events through the light that has been thrown on them by subsequent history, it appears to the unprejudiced thinker that no great harm could have come to the South from the loss of political power. The equipoise of power once thought so important by both sections had been forever destroyed, and with it a great part of the necessity for such equipoise had disappeared. In fact, to the cool and far-seeing statesman who was considering the means of safety for his section it would have appeared better,—since the equipoise was destroyed and with it was lost the power to protect Southern interests by the forms of the Constitution,—that a large part of this power should itself disappear. If it remained very large it would be the occasion of exciting passions and prejudices in the North by the charge on the South of attempting to rule the country. If it were small, it would cease to be a menace to Northern interests, and when local Southern interests were involved it could have been made efficient for self-protection by temporary alliances with parties in the North. As it was, the power remaining to the South was large enough to excite prejudice and opposition in the North, and not large enough for self-protection.

But, however we consider the matter, it appears now that the South was without blame in rejecting the Fourteenth Amendment under the circumstances then existing.

It must be remembered that the Fourteenth Amendment contained many distinct and independent propositions, each of which had no relation to the others. This was the first instance in our history in which such an amendment had been submitted as an entirety. It resulted that no opportunity was given to accept a part and reject a part. An effort was made, but failed, to submit each section of the

Fourteenth Amendment as a separate article, whereby a part could be ratified and a part rejected; so that when the Southern States came to act on these various propositions contained in the Fourteenth Amendment they were obliged to ratify or reject it as a whole. There is but one excuse for such a submission and that is that the whole constituted a scheme for reconstruction, and the North would demand no more and accept no less. But the failure to pass that bill accompanying the Fourteenth Amendment, which contained the engagement that restoration to full political rights should come from this proposed amendment, left the South without any assurance that restoration would come from ratification.

It will be seen hereafter that there was dispute and disagreement among the leaders of the Republican party as to whether there was an implied engagement even that the South should be restored on ratification of the Fourteenth Amendment.

The Southern States, having under these circumstances failed to ratify the Fourteenth Amendment, the situation was such as to permit a renewal of the matter in Congress.

The Congressional elections in the fall of 1866 had been favorable to the Republican party. When the second session of the Thirty-ninth Congress met in December of that year the dominant party took a new and advanced position. On the second day of the session Mr. Broomall, of Pennsylvania, offered a resolution directing the Committee on Territories in the House to "inquire into the expediency" of reporting territorial bills for the Southern States, except Tennessee, and to give all adult males, native born and naturalized, who were not participants in the rebellion, equal and full political rights. This resolution was adopted by yeas, 107; nays, 37.[1]

Up to that date the scheme had been to give the Southern States the choice between the acceptance of Negro suffrage within their respective limits and the loss of political power. Now it appeared by a vote of more than three to one that this choice was to be withdrawn and Negro suffrage would be imposed, and a large number of the whites disfranchised. Up to that date Congress had agreed that the attempted secession had been ineffectual to withdraw the

[1] *Globe*, 2d Session, 39th Congress, p. 11.

Southern States from the Union, and that the State governments reorganized in 1865 were competent and legal governments. Now under this resolution these governments were not only adjudged to be illegal, but the States themselves were held not to be States but mere territories, over which Congress might exercise full jurisdiction and establish such local governments as they might deem proper.

On the next day Mr. Sumner offered in the Senate a series of resolutions of similar import,—resolutions declaring explicitly that the rebel States were not entitled to a voice in the adoption of amendments to the Constitution.

On January 3, 1866, Mr. Stevens offered a substitute to the Reconstruction Bill, which had accompanied the Fourteenth Amendment, as has been before explained.

This substitute took the full advanced position of the most radical advocates of the theory of the conquest and subjugation of the South. The change in the programme was significantly marked by the preamble to the substitute. In the preamble to the former bill, the Southern States were denominated as "States lately in rebellion," and it was declared that it was "expedient that these States should at the earliest day consistent with the future peace and safety of the Union be restored to full participation in all political rights." The preamble of the substitute declared that the eleven States that lately formed the Government called the Confederate States of America had forfeited all their rights under the Constitution and could be reinstated only through the action of Congress. The bill provided that these eleven States, except Tennessee, might form valid State governments as provided therein. It declared that the *de facto* governments in these States were illegal, but were to be recognized as valid for municipal purposes until duly altered.

The bill then provided for the election of delegates under national authority to form a Constitution in each State, and declared all male citizens over twenty-one years old, resident in the State twelve months and in the district ten days, competent electors and delegates, and that "citizens" included all natives or naturalized persons, except Indians not taxed.

By section six it was provided that all who had held office, civil or military, under the Confederate Government, or who had sworn allegiance to the same, had renounced their allegi-

ance to the United States and had forfeited their citizenship until five years after they had filed their intention or desire to be reinvested with citizenship. It allowed, however, such Confederates to vote as would swear that on and after March 4, 1864, they had desired the success of the Union arms and had not since then aided the rebellion.

By section seven it was required that the Constitutions so framed should not deny the civil and political equality of any citizen, and that all laws should be impartial, without regard to language, race, or former condition; and if this should be ever afterward altered, the State should lose its right to representation in Congress. The bill did not require ratification of the Fourteenth Amendment by the Southern States.[1]

Mr. Stevens, in presenting the substitute, deprecated the leniency with which the Southern people had been treated by the President, and arraigned that officer for opposition to the ratification of the Fourteenth Amendment, charging him with desiring that the Southern States should have an increase in their representation without increasing the number of their voters, whereby one rebel in South Carolina was to be equal to three freemen in New York and Pennsylvania. He declared that a majority in Congress desired that treason should be made odious, "not by bloody executions, but by other adequate punishments."

He denied that there was any understanding, "expressed or implied," that upon the adoption of the Fourteenth Amendment by any Southern State such State, before said amendment should become a part of the Constitution, should be admitted to representation. He denied that any such State could ever ratify the amendment; "to allow it would be yielding the whole question and admitting the unimpaired right of the seceded States."

Expressly confining his argument to Negro suffrage in the Southern States, he said:

"Have not loyal blacks quite as good a right to choose rulers and make laws as rebel whites? . . . Another good reason is, it would insure the ascendency of the Union [Republican] party. 'Do you avow the party purpose?' exclaims some horror-stricken demagogue. I do. For I believe, on

[1] *Globe*, 2d Session, 39th Congress, p. 250.

my conscience, that on the continued ascendency of that party depends the safety of this great nation. If impartial suffrage is excluded in the rebel States then every one of them is sure to send a solid rebel representative delegation to Congress; and cast a solid rebel electoral vote. They, with their kindred copperheads of the North, would always elect the President and control Congress. . . . I am for Negro suffrage in every rebel State. If it be just, it should not be denied; if it be necessary, it should be adopted; if it be a punishment to traitors, they deserve it." [1]

In the same speech Mr. Stevens showed the disposition of his party toward the Supreme Court of the United States. Referring to the decision of that court in the case "*Ex parte* Milligan," then recently made, he said that decision made it necessary to act without delay. "That decision, although in terms not perhaps as infamous as the Dred Scott decision, is yet far more dangerous in its operation upon the lives and liberties of the loyal men of this country. That decision has taken away every protection in every one of these rebel States from every loyal man, black or white, who resides there. That decision has unsheathed the dagger of the assassin, and places the knife of the rebel at the throat of every man who dares proclaim himself to be now, or to have been heretofore, a loyal Union man." [2]

The decision here denounced merely held unconstitutional the trial by military commission of persons in civil life in States never in rebellion.

Mr. Bingham, of Ohio, took issue with Mr. Stevens as to the understanding about the Fourteenth Amendment's being the basis of reconstruction. He said that members of the Committee on Reconstruction were committed to that view, and proceeding, he declared "the people of the United States so understood and accepted it. There are gentlemen here, not a few I undertake to say, who owe their re-election to the Fortieth Congress to the fact that the Union State conventions in the States which they represent upon this floor declared their acceptance of this constitutional amendment, in manner and form as it now stands, as a condition of future restoration."

[1] *Globe*, 2d Session, 39th Congress, p. 252.
[2] *Ibid.*, p. 251.

And he declared further that Mr. Stevens' substitute conflicted with the Fourteenth Amendment. "It is a clear, palpable departure from the intent and letter of your constitutional amendment." [1]

Other members also took issue with Mr. Stevens, as will be hereafter seen.

The clear and palpable departure from the Fourteenth Amendment, as stated by Mr. Bingham, is found in the fact that the amendment was submitted to the then existing State governments, and the bill accompanying it only required that it should be ratified by such governments, and its ratification would have had no other effect on suffrage than to diminish the representation of a State to the extent that it should exclude male adults from voting. The bill, however, of Mr. Stevens submitted the amendment to State governments organized on Negro suffrage and required the Constitutions so formed to provide for such suffrage forever. And it will be seen that, though this particular bill of Mr. Stevens did not pass, the substantial feature of it as to suffrage was finally adopted.

On February 6, 1867, Mr. Stevens, having abandoned the bill just noticed, reported from the Reconstruction Committee another bill on this subject.

This bill assumed military control of the Southern States at the end of two years from the close of the war. It provided for dividing the Southern States, except Tennessee, into five military districts, each to be under the command of an officer to be assigned by the General of the Army. It suspended the writ of *habeas corpus,* and gave the District Commander power to protect all persons in their right of person and property, to suppress disorder and violence, and to try criminals either by the civil tribunals or by military commission.

The bill contained no provision whatever for reconstruction. It simply organized military rule in the Southern States.[2]

Various propositions were made to amend it, and among them one by Mr. Blaine, which is of sufficient importance to require notice, as well as some of the debates on it.

[1] *Globe,* 2d Session, 39th Congress, p. 500.
[2] *Ibid.,* p. 1037.

This amendment was to the effect that when the Fourteenth Amendment should have become a part of the Constitution by the ratification of three-fourths of the States then represented in Congress, "and when any one of the late so-called Confederate States shall have given its assent to the same and conformed its Constitution and laws thereto in all respects; and when it shall have provided by its Constitution that the elective franchise shall be enjoyed equally and impartially by all male citizens of the United States, twenty-one years old and upward, without regard to race, color, or previous condition of servitude, except such as may be disfranchised for participating in the late rebellion; and when said Constitution shall have been "duly ratified by the voters of the State, and approved by Congress," then such State shall be "declared entitled to representation in Congress" and the military government established by the bill shall cease.[1]

Mr. Blaine argued in support of his amendment that it did nothing more for the other nine Southern States than was done by the bill in relation to Louisiana that day passed by the House; that the bill proposed no civil government for the other States, and if the amendment was adopted, something would have been achieved "as a basis of reconstruction, and we bring Congress up to the declaration of making equal suffrage" the basis of reconstruction.

He insisted specially on the fact that the amendment declared the doctrine that "three-fourths of the States now represented in Congress have the power to adopt the constitutional amendment, and does not even by implication give the Southern States ground to believe that their assent or ratification is necessary to its becoming a part of the Constitution. It implies that their assent to it is a qualification for themselves; merely an evidence both moral and legal of good faith and loyalty on their part." [2]

Mr. Raymond, of New York, insisted that the late election in the Northern States turned upon the conceded fact that the Fourteenth Amendment alone was to be the basis of reconstruction without any additional requirement as to suffrage as a condition of admission of the Southern States to representation.

[1] *Congressional Globe*, 2d Session, 39th Congress, p. 1182.
[2] *Ibid.*

Mr. Blaine rejoined that, with the single exception of New York, he did not recall a single convention that made the declaration that no more should be required than the Fourteenth Amendment.

Mr. Raymond said that while no such specific declaration was made, it was true that Congress had adopted no other basis than the amendment, yet it was fair to presume that such was the understanding, and "especially as the issue was made distinctly between the policy of the President and the policy of Congress."

Mr. Garfield, correcting an alleged misrepresentation of his speech on a former occasion, said: "I did say the other day, and I say now, that if the amendment [the Fourteenth] proposed at the last session of Congress had been ratified by all the States lately in rebellion in the same way that Tennessee ratified it, and if those States had done all the other things that Tennessee did, I should have felt myself morally bound, though it fell very far short of full justice and of my own views of good statesmanship, and I believe the thirty-ninth Congress would have been morally bound to have admitted every one of the rebel States on the same terms." [1] Yet Mr. Stevens and Mr. Blaine said no offer was made.

Mr. Garfield said in the speech made on the 8th of February to which he referred: "The constitutional amendment did not come up to the full height of the great occasion; it did not meet all that I desired in the way of guarantees to liberty; but if the rebel States had adopted it as Tennessee did, I should have felt bound to let them in on the same terms prescribed for Tennessee. I have also been in favor of waiting, to give them full time to deliberate and act. They have deliberated; they have acted. The last one of the sinful ten has at last, with contempt and scorn, flung back into our teeth the magnanimous offer of a generous nation. It is now our turn to act." [2]

Mr. Garfield said in his speech on the 8th of February: "I am aware that this is a severe and stringent measure. I do not hesitate to say that I give my assent to its main features with many misgivings." [3]

[1] *Congressional Globe,* 2d Session, 39th Congress, p. 1183.
[2] *Ibid.,* p. 1104.
[3] *Ibid.*

Nevertheless, the bill of Mr. Stevens, without material amendment, was passed. The amendment of Mr. Blaine and other amendments were lost.

On the final passage in the House, the yeas were 109, the nays 55, absentees 26.[1]

The bill as it passed the House was in no sense a reconstruction measure, but a pure and simple military government for the South, without a provision or engagement that it should cease, and without proposing any terms to the South on compliance with which the States could be admitted to representation in Congress. It will be seen that the excuse for this measure as given by Mr. Garfield was that the South had rejected the Fourteenth Amendment. The temper of the House, as shown by the debate, was of the harshest; denunciation of the South was the staple of most of the speeches made.

Mr. Garfield claimed that it was "the right of the victorious Government to indict, try, convict, and hang every rebel traitor in the South for their bloody conspiracy against the Republic." [2] That "they had forfeited every right of citizenship by becoming traitors and public enemies." [3] That "the time has come when we must lay the heavy hand of military authority upon these rebel communities." [4]

Mr. Stevens said: "For two years they [the Southern States] have been in a state of anarchy; for two years the loyal people of those ten States have endured all the horrors of the worst anarchy of any country: persecution, exile, murder, have been the order of the day within all these Territories so far as loyal men were concerned, whether white or black, and more especially if they happened to be black." [5]

Mr. Brandagee, of Connecticut, declared the old rebellion had not been suppressed. "It still lives; it dominates in every one of these reconstructed States; it has made loyalty odious and treason respectable by forcing traitors into the gubernatorial chairs of ten of the eleven of these revolted communities; in ten out of eleven it has sent traitors who

[1] *Congressional Globe,* 2d Session, 39th Congress, p. 1215.
[2] *Ibid.,* p. 1103.
[3] *Ibid.,* p. 1104.
[4] *Ibid.*
[5] *Ibid.,* p. 1076.

audaciously demand seats upon this floor; it has clothed treason with the ermine on the bench of the ten revolted States; it has filled their halls of local legislation; it has armed treason with the sword of the law in ten of the States; it holds to-day the pen of the press, that weapon mightier than the sword; it desecrates the word of the Most High from all their pulpits; it hisses out curses against the Union from the sibilant tongues of its women and the prattling lips of its babes, . . . and it scouts and throws back in your teeth the mild and merciful terms of reconstruction offered in the constitutional amendments of last session." [1]

There were not, however, wanting those who pleaded for generosity and magnanimity toward the Southern people. To their suggestions Mr. Stevens said: "Generosity and benevolence are the noblest qualities of our nature, but when you squander them upon vagabonds and thieves you do that which can command no respect from any quarter. . . . I desire to say what perhaps had better not be said, that gentlemen who are thus, by direction or indirection, defending the cause or palliating the conduct of these rebel traitors are making for themselves no good record with posterity. They, sir, who while preaching this doctrine are hugging and caressing those whose hands are red and whose garments are dripping in the blood of our and their murdered kindred, are covering themselves with indelible stains, which all the waters of the Nile cannot wash out." [2]

This bill was also urged as a party measure, as the former bill had been. Mr. Garfield, on this subject, said: "But, sir, the hand of God has been visible in this work, leading us by degrees out of the blindness of our prejudices to see that the fortunes of the Republic and the safety of the party of liberty are inseparably bound up with the rights of the black man. At last our party must see that if it would preserve its political life, or if we would maintain the safety of the Republic, we must do justice to the humblest man in the nation, whether white or black. I thank God that to-day we have struck the rock; we have planted our feet upon the truth. Streams of light will gleam out from the luminous truth embodied in the legislation of this day. This is the *ne plus ultra*

[1] *Congressional Globe,* 2d Session, 39th Congress, pp. 1076-7.
[2] *Ibid.,* p. 1214.

of reconstruction, and I hope we shall have the courage to go before our people everywhere with 'This or nothing' for our motto." [1]

"This or nothing" refers to the bill for reconstruction in Louisiana. This bill passed the House of Representatives February 12, 1867, by yeas 113, nays 47. [2]

Its substantial provisions are:

1. That a provisional Government be established in Louisiana with a Governor and Council of nine to be appointed by the President with the consent of the Senate. The Council had legislative power. These officers were irremovable except with the consent of the Senate. Laws passed by the Council were subject to be annulled by Congress.

2. The Governor and the Council and all other officers including members of the constitutional convention and members of the Legislature were to be entirely free from any participation in the rebellion, and were to take the iron-clad test oath prescribed by the act of Congress of July 2, 1862.

3. A legislature was to be elected on the first Tuesday in June, 1867.

4. The electors were to be male citizens of the United States, without distinction of color, and they were also to take said iron-clad oath with the following exception:

5. That persons who served as privates only in the Southern army might be electors if they would swear and prove before a United States Court by persons of undoubted loyalty that since March 4, 1864, they were really in favor of the Union, and had not since that time voluntarily done any act in favor of the rebellion. If acts were done in aid of the rebellion, then it was to be presumed that they were voluntary until proof was made to the contrary.

6. A convention was to be held under rules prescribed by the Secretary of War.

7. An army officer, not lower in rank than Brigadier General, was to be appointed military commander of the State, and he was to arrest and hold violators of the law until they were prosecuted by the civil authorities.

8. The militia of the State, to consist only of qualified electors, were to organize and be equipped as soon as prac-

[1] *Congressional Globe,* 2d Session, 39th Congress, p. 1184.
[2] *Ibid.,* p. 1175.

ticable, and to be under the command of the military commander of the State.

9. The Constitution was to contain provisions for repudiating the rebel debt, and that no pension, compensation, gift, or gratuity shall be bestowed upon or paid by the State to any person by reason of anything done or suffered in aid of the rebellion, and these powers were to be irreversible and unchangeable by amendment.

10. The Constitution was also to provide against any distinction in the rights of men on account of race or color.

11. The Constitution was to be approved by a majority of the electors.

12. Until the State was admitted to representation in Congress, a delegate to Congress was to be elected having the power and right of a territorial delegate.[1]

This was the rock of truth on which Mr. Garfield said his party had placed its feet.

[1] *Congressional Globe,* 2d Session, 39th Congress, pp. 1173-4.

CHAPTER III

THE BILL A MEASURE OF PUNISHMENT AND RUIN

As a further evidence of the temper and intent of this bill, it is proper to quote again what Mr. Garfield said: "If the Democratic party, with the President at its head, had, on any day since July last, advised the people of the South to accept the constitutional amendment and come in as Tennessee did, it would have been done. I have information from a source entirely reliable that a little more than a month ago [this was spoken on February 12, 1867] Alabama was on the eve of accepting the proposed amendment to the Constitution when a telegram from Washington dissuaded her from doing so and led her to rush upon her own ruin by rejecting it." [1]

It has been seen that many members made the rejection of the Fourteenth Amendment by the Southern States the ground or the pretext for their support of this military bill. How little justice there was in this is manifest from a consideration of the circumstances. It was never offered to the Southern States up to that date as a condition of reconstruction. Congress had never prior to its rejection passed any act or resolution that indicated that the acceptance of this amendment by the Southern States was required, or even desired, as a step in the process of reconstruction. The bill which the Committee on Reconstruction had reported with the amendment, and which did contain a provision that acceptance of that amendment was a condition of reconstruction, was never passed, nor was any serious attempt made to pass it. It was suffered to die without action. This of itself was evidence to the Southern States that its enforced acceptance by them was not demanded. The amendment was, therefore, submitted to them, as it was to every other State, for their free and voluntary action, as was proper under the

[1] *Congressional Globe*, 2d Session, 39th Congress, p. 1183.

Constitution of the United States. In the exercise of their judgment, they regarded it as some of the Northern States did. As has been shown, it contained provisions that were intended to be odious and even insulting, and they were not allowed the privilege of voting separately on its various provisions, ratifying a part and rejecting a part.

Again it was announced by many of the leaders of the dominant party, and among them Mr. Stevens and Mr. Blaine, that they had no power to ratify.

After their rejection of the amendment it was, as has been seen, a matter of serious dispute among the leading members of the dominant party whether there was an implication even from all the circumstances that it had been submitted to them as a condition of reconstruction. Such men as Mr. Stevens and Mr. Blaine insisted that no such submission had been made. Mr. Blaine himself, in explaining his amendment to the military bill, expressly stated that even by it there was no submission to them as parties capable of ratifying it. His amendment expressly affirmed that the constitutional amendment would become a part of the Constitution upon its ratification by three-fourths of the States then represented in Congress. That amendment, carefully omitting the constitutional word "ratification" applied by it to the other States, provided only for the assent of the Southern States and not ratification by them. The majority of the Republican speakers in the House agreed that the Southern States had no constitutional power to ratify the amendment. So that the submission of the amendment to the Southern States was not, if these views were correct, a constitutional act; nor would their action on it have the slightest constitutional validity. In short, the Southern States were complained of for not doing an act not authorized by the Constitution, in the judgment of those complaining, and not even required by Congress, and their refusal to do it was treated, as described by Mr. Garfield, as rushing upon their own ruin.

This complaint may justly be made of the action of the majority in Congress that when they discovered, as was developed in the debate on this bill, that there was a difference among their most distinguished members on the question whether or not such submission had been really made to the Southern States as a condition of reconstruction, it should

have led them, if they so desired it, to make such submission in plain terms. The Southern States were not represented in either House. They could not know more of the will of Congress, in respect to their destinies, than Congress should choose to express. Congress made no expression on this subject until after the States had acted. The matter rested in implication, about which the most distinguished of their number differed. The Southern States were suffered "to rush upon their own ruin," as Mr. Garfield expressed it, without the slightest notice that their action would be so treated by those who had the power to inflict the "ruin." Congress did afterward make the expression, but the very act of expression was accompanied by the infliction of the penalty of disobedience,—their ruin. The disobedience was the failure to obey a law not in force when the act was committed.

CHAPTER IV

THE MILITARY BILL IN THE SENATE

When the bill went to the Senate, Williams, of Oregon, proposed an amendment framed on the basis of Mr. Blaine's amendment, which had been offered in the House, but was lost. There was, however, this remarkable difference between the two, that Williams' amendment omitted wholly the declaration in Mr. Blaine's that the constitutional amendment might lawfully be ratified by three-fourths of the States then represented in Congress.[1]

Mr. Williams on the next day abandoned the proposition on the ground that it would endanger, if not absolutely defeat, the bill. For the same reason he said he would oppose all amendments to the bill; and being in charge of the bill, he gave notice that he would press for a final vote on its passage before the next succeeding night.

Reverdy Johnson then offered the amendment of Mr. Williams, saying that, though he should vote against the bill, the amendment would make it less objectionable.[2]

Mr. Stewart expressed his regret that Mr. Williams had changed his mind in reference to the amendment, saying: "The military bill without that, it seems to me, is an acknowledgment that after two years of discussion and earnest thought we are unable to reconstruct, and are compelled to turn the matter over to the military." [3]

Mr. Howard objected to the amendment, among other grounds, on this, that it was incompatible with the bill. He insisted that the Southern States were in law conquered territory and subject to the absolute control of Congress, and on this theory the bill was framed. The amendment, however, recognized State powers and State rights, the power in the

[1] *Congressional Globe*, 2d Session, 39th Congress, p. 1361.
[2] *Ibid.*
[3] *Ibid.*

Southern States to act "in the most solemn proceeding in which a State can act, the ratification or rejection of the amendment of the Constitution," and the power to "amend their own Constitutions." He said: "If these States are thus invested with State authority, if they can legislate as States, if they can amend their Constitutions as States, if they can change their legislation so as to conform, in the language of this amendment, to the amendment to the Constitution suggested at the last session, then they can adopt any other kind of State legislation which they may see fit; then they are, indeed, *sovereign States,* and, in the language of Mr. Seward, in his Cooper Institute speech of the 22d of February, 1866, they are as fully and completely invested with State authority as the Legislature of the State of New York, then in session." [1]

Mr. Stewart argued strenuously for the amendment, stating that there should be some end fixed by the bill to the military government; that it would be unsafe and unwise to leave this to future legislation.

He said: "I would not trust myself with absolute power; I will not trust another; and I want to say in this very bill, 'Thus far will I go and no farther.' When the bill is passed I may love this power too well to surrender it.

"I say, then, place the limit in this bill; say to these people: Whenever you comply with the demands of the loyal masses of the North, whenever you comply with the dictates of humanity, whenever you make your institutions correspond with the principles of the Declaration of Independence, we will then recognize you as free communities, and remove from you the iron hand which the necessity of the case has made us place upon you, unfortunate rebels. We will hold that hand upon you until you learn to do good and cease to do evil, till you stop your New Orleans riots, till you cease to persecute Union men, till you acknowledge the rights of all men; and when that is done we will release it at once, and we will not hold it then an hour afterwards." [2]

[1] *Congressional Globe,* 2d Session, 39th Congress, p. 1365.
[2] *Ibid.,* p. 1367.

IMPARTIAL SUFFRAGE IN FORCE

Mr. Hendricks moved so as to require of the States only that the suffrage should be "impartial" as between blacks and whites, and not "universal," so that the ignorant and unqualified persons of both races might be excluded.[1]

Mr. Doolittle, in support of this, said he had reason to believe that if only "impartial" suffrage were required of the people of the South, they would accept it; but if universal suffrage were required, they would reject it. In support of this view, he spoke of the difference in intelligence between the Negroes in the North and in the South. He said that only the more enterprising Negroes had come North,—those educated in the hotels, on steamboats and in families, who have mingled with freemen and have been freemen themselves for a long time, have families, support themselves, and are educated in the habits and thoughts and feelings and responsibilities of freemen; that it was unaccountable to him that any statesman should insist that the great mass of the Negroes in the South who had just been released from bondage should hold the elective franchise and determine the interests of the States and the nation.[2]

This view was not disputed. The answer was, not that they were competent, but that if impartial suffrage were adopted, it was plain and palpable that nearly all the colored persons would be excluded, and that the only opportunity of these men was to require universal suffrage on the basis of manhood.

Mr. Doolittle urged upon Senators of the majority to weigh seriously the question of impartial suffrage, "because upon it may depend whether the people of the South will accept your constitutional amendment and accept the proposition which is necessary to get rid of military domination."

Mr. Wilson said: "Make them."[3]

Mr. Doolittle continued: "My friend says, 'Make them accept it.' . . . I ask the Senator from Massachusetts if that is the true language of a statesman, to say to a people who, like ourselves, have been educated in the largest liberty, a

[1] *Congressional Globe*, 2d Session, 39th Congress, p. 1374.
[2] *Ibid.*, p. 1375.
[3] *Ibid.*

people in whose veins the Anglo-Saxon blood is flowing, which for a thousand years has been fighting against despotism in every form, 'You must accept this position at the point of the bayonet, or forever live with the bayonet at your throats'? Is that the way to make peace? Disfranchise the whites and put the rule in these States into the hands of the blacks, and hold the whites in subjection at the point of the bayonet; is that what you call making peace? Is that organizing a civil Government which is to educate the people up to a Republican form of government?" [1]

Mr. Wilson said that the Fourteenth Amendment was often undervalued. He believed its adoption as a part of the Constitution of the United States would settle all these questions in ninety days. "They have refused it. Now, sir, I would require them to adopt it, to adopt manhood suffrage, and to give equality of rights and privileges to all citizens without distinction of color. We have the power to do it; we have the right to do it on account of their rebellion." [2]

The proposition of impartial suffrage was rejected.

The amendment of Mr. Williams, withdrawn by him and then offered by Mr. Johnson, was opposed by Republican Senators on other grounds relating to the sovereignty of the States. Mr. Howard contended that, while he did not doubt the power of Congress to pass any law in reference to the conquered provinces, as he deemed the Southern States, he yet shrank from the proposition to require them to adopt Negro suffrage. He argued that such a proposition was a complete departure from the action of the Committee on Reconstruction, so far as the right of suffrage is concerned. That committee, after having considered the subject referred to them for some eight months, made their report to the Senate; indeed, they made several reports, but in not one of their reports did they propose to interfere by the legislation of Congress, or in the form of an amendment to the Constitution, with the right of suffrage within the States. They have carefully abstained from all attempts to interfere with that very sacred right. They thought it not worth while to intermeddle, and I think they acted wisely. The Senate itself, by repeated votes, has sanctioned that course. The

[1] *Congressional Globe*, 2d Session, 39th Congress, p. 1375.
[2] *Ibid.*, p. 1375.

whole subject has been discussed with great fullness and clearness before the people during the last Congressional elections, and the people have very generally understood that it is not the purpose of Congress to intermeddle with the right of the State to regulate the suffrage of its citizens. "The amendment now before us proposes a different policy. It proposes in direct terms that we shall interfere in regulating the suffrage of citizens in the rebel States, a thing from which the committee industriously and cautiously abstained." [1]

He then read the Fourteenth Amendment, in which it will be noted there was no attempt to confer suffrage on Negroes otherwise than by requiring that the Constitution of the Southern States when formed should provide for that, thus leaving the whole matter of reconstruction to the white voters. In other words, as the amendment read, it was a proposition to the white people of the South alone to engraft Negro suffrage on their new Constitutions as a condition of representation in Congress. The Negro was not considered in this proposition. He was not to act, but only to be the subject of the prescribed action of the whites.

Mr. Howard objected also that the proposition just named was coercion. He said that the "provision contemplates a sort of coercion to be exercised through an act of Congress upon the State to constrain it, in order to get into Congress, to admit the black population to vote." [2] He disliked to attempt such an interference, though he admitted the power of Congress to do it.

Mr. Howard disliked the amendment because it proposed terms to rebels, saying: "I make no proffer; they know their duty well. They knew it five years ago. . . . They have waged a bloody and wasteful war upon my friends, my neighbors, my countrymen, and my Government, and persevered in it until the whole land was covered with mourning and tears and blood. I would be the last man, after having crushed them and trampled them under my feet, to make gratuitous propositions of reconciliation to them. Let them come up and do their duty like men and citizens of the United States. . . ." [3]

[1] *Congressional Globe*, 2d Session, 39th Congress, p. 1381.
[2] *Ibid.*
[3] *Ibid.*

Mr. Stewart asked him to state what he believed to be their duty.

Mr. Howard: "The first duty of every community that has a Government is to punish crime and to protect its friends. . . . The great and paramount duty of the rebel State Governments, their first and leading duty, is to punish crime and thereby to protect the peaceful and the innocent." [1] Mr. Howard mentioned no other duty.

FORCED TO RATIFY A CONSTITUTIONAL AMENDMENT

Mr. Hendricks agreed with Mr. Howard that the bill was coercion on the Southern States to compel them to ratify an amendment to the Constitution. On this point he said: "Any amendment of this nature [the Williams Amendment offered by Mr. Johnson] is substantially a proposition to the people of the South that if they will agree to the constitutional amendment [the Fourteenth] proposed at the last session of Congress, and to other propositions, it is very well; but this is submitted to them with the bayonet presented at the same time, and an amendment to the Constitution of the United States, which the fathers intended should be entirely at the will and pleasure of the States, is to be secured by the military power of the country." [2]

And, speaking of the bill and of the Louisiana bill, he said: "I know of no language which I can command that will describe my hostility to both bills." The Louisiana bill is "more insidious, and if it were parliamentary to say so, I would add, more cowardly in its attack on liberty. The bill which is now before us proposes in a bold way, outright and straightforward, by physical power to govern the people of the South; the other bill, by a political machinery, proposes to strip them of free government, and, under the pretense of guaranteeing a Republican form of government, to take away from the people the power to decide upon their own institutions." [3]

Mr. Hendricks referred to the preamble of the bill, which alleged "that the pretended governments" in the Southern

[1] *Congressional Globe,* 2d Session, 39th Congress, p. 1381.
[2] *Ibid.,* p. 1385.
[3] *Ibid.*

States "were set up without the authority of Congress and without the sanction of the people;" these governments "afford no adequate protection for life or property, but countenance and encourage lawlessness and crime," and that "it is necessary that peace and good order should be enforced in said so-called States until loyal and Republican State governments can be legally established" therein.[1]

He insisted that the majority had too often been committed to the proposition that "these States did not cease to exist because of the ordinances of secession" now to turn their backs on it; that Congress had too often recognized them as States since those ordinances were adopted to allow the majority now to deny their existence as States. He asked when did they cease to be States and come to be pretended governments? He desired to know when it was and how it was this change took place; did the rebellion disrobe them as States? "We have said the contrary too often to aver that now." "Did they cease to be States by the act of secession, by the act of rebellion, by the act of war, or was it because the rebellion itself was defeated?" [2]

The preamble of the law, it will be remembered, is the formal statement made in the most solemn form of the reason or occasion of the enactment of the law. Calling attention to the preamble, it will be seen that, though all these proceedings took place after the rejection of the Fourteenth Amendment by the Southern States, nothing is said in it about that rejection. If it be averred, as is sometimes done, that the rejection of that amendment was the reason of the subsequent reconstruction legislation of Congress, including the Fifteenth Amendment, the answer is found in the solemn statements made in the preamble to this and other bills passed on the subject. This preamble, as it is above set out, received the sanction of the House of Representatives, and it was substantially adopted in all respects in the bill that finally passed both Houses.[3] This solemn statement of the reason for passing the bill not only does not sustain the charge that the rejection of the Fourteenth Amendment was the reason for the subsequent reconstruction measures, but by an irresisti-

[1] *Congressional Globe,* 2d Session, 39th Congress, p. 1037.
[2] *Ibid.,* p. 1385.
[3] XIV U. S. Statutes at Large, p. 428.

ble implication avers the contrary. It avers that the State Governments are illegal or pretended Governments, set up without the consent of the people of the several States. If so, these Governments had neither the legal nor the moral right to ratify an amendment to the Constitution; not the legal right, because they themselves were illegal and pretended Governments; not the moral right, because such action would be a usurpation and assumption to speak for a people who had never consented to them.

Mr. Hendricks, in commenting on the preamble, stated that it contained propositions of fact "upon which the majority now claim the right to establish such a Government as this bill proposes." He then went on to show that the allegation, in the preamble, of lawlessness in the South and the complaint that the State Governments furnished no adequate protection to life and property were untrue in point of fact; and he made some statements as to lawlessness in the Northern States and their failure to punish adequately the most atrocious crimes.

CHAPTER V

DISHONOR TO SOUTH IN THE FOURTEENTH AMENDMENT

Mr. Hendricks, proceeding, said he did not "know that it is worth while now to say a word in behalf of the people of the South. I am not going to apologize for their conduct. But, sir, they have submitted to the military authority of the Government most reluctantly upon their part; their arms have been laid down or taken from them; they have in every way in which they could do so addressed themselves to this Government for pardon and for restoration in all their relations to the Government, and for nearly two years they have been refused; they have agreed to the constitutional amendment abolishing slavery; they have modified their own Constitution so as to abolish slavery; they have repudiated the Southern debt contracted during the war; they have done all that they understood was required of them, except to adopt the last constitutional amendment; they have not adopted that, and I do not know that they ever will. Upon that subject I have no opinion to give. Some Senators on the other side know very well that there was a provision introduced into that constitutional amendment that made it almost impossible for the people of the South to adopt it. I speak of that provision which especially degraded the military officers of the South and cut them off from all positions in the Federal and State Governments." [1]

A PLEA FOR HARMONY AND RESTORATION

Mr. Hendricks then made an eloquent appeal for restoration, saying: "It is the highest duty of the citizen and of the statesman now, by every effort possible, to restore harmony and peaceful relations." If Senators desired that Representatives from the Southern States should take a test oath, let it

[1] *Congressional Globe*, 2d Session, 39th Congress, p. 1389.

be so, but let them be represented. "Let the wheels of this Government move on according to the Constitution." He further said: "As I read this bill and contemplate its wonderful provisions, it is almost impossible for me to believe that Senators by this policy desire restoration, . . . or harmony." He did not believe "that the safest way to establish liberty is first to establish despotism." [1]

An amendment to the Williams-Johnson amendment was proposed and carried, requiring that the electors for delegates to the Constitutional Convention in any State should include Negroes. This was done after one o'clock A. M. on the 15th of February, but the amendment thus amended was still unacted on.

STATUS OF THE SOUTHERN STATES

It will be noted that the Williams-Johnson amendment up to the present had made no expression as to the number of States necessary to ratify the Fourteenth Amendment. The provision on that subject was only when "said amendment shall become a part of the Constitution of the United States."

Mr. Sumner proposed to remove the ambiguity which he said "leaves open to question whether these sham governments may not, by some hocus-pocus or other, be enlisted in the number of States to constitute the three-fourths required." His amendment was to the effect that three-fourths of the States then participating in the Government were sufficient to ratify the Fourteenth Amendment.

Mr. Johnson suggested that whatever might be the declaration of the Senate on that point, still it must finally be decided by the courts.

Mr. Saulsbury stated that a consequence of the amendment of Mr. Sumner was that "a majority of the representatives of the States" in the Senate "may get together and close the door against the representatives of the other States," and then, through the "assent of three-fourths of the States so represented," excluding the remainder, would ratify the amendment, though they might not be a majority of the States of the Union. "In the commencement of the late civil war Congress by resolution recognized every Southern State as a State of this Union, although those States were not represented in Con-

[1] *Congressional Globe*, 2d Session, 39th Congress, p. 1389.

gress. You have passed more than a hundred bills . . . during the civil war . . . . in which and by which you recognized those States as States in the Union; you levied taxes on them as States . . . . you appointed officers [revenue] in those States as States, naming them as States. Even Mr. Lincoln . . . . by his proclamations, and by almost every official act having reference to those States, recognized them as States. You have appointed District Judges of the Courts of the United States in those States as District Judges for those States. And when the Senator from Massachusetts . . . . offered a resolution declaring in substance that the States might commit political suicide and be no longer States in the Union, it received . . . . no support from your party except the individual vote of that Senator."

He impeached the consistency of Republican Senators and declared: "It was only when you became successful in the conflict that you proclaimed this doctrine which the Southern States first proclaimed, that they had a right to withdraw from the Union. You now practically admit the very doctrine for which they contended, that they had the right, if they could only vindicate that right by the power of the sword, to withdraw from the Union. You said that they had no power to withdraw from the Union. . . . and yet after the result of the conflict of arms has been in your favor, you turn round and proclaim, not only to them, but to the whole world, that the very doctrine you preached was not true, and that they might take themselves out of the Union, and that you might hold them as subject provinces, and that you might parcel out their domain to military satraps, and subject the people of those States to the mere arbitrary will of a majority of the Federal Congress." [1]

Mr. Doolittle spoke against the proposition of Mr. Sumner with great force. He said: "The very fundamental idea of our institutions rests upon self-government, the idea that the people have a voice in their governments, a voice in making their fundamental laws. The idea of the Senator from Massachusetts strikes at the very foundation of everything like Republican government. To say that ten million people, because to-day they happen not to have representatives admitted into Congress,—not because they have not sent them here, but

[1] *Congressional Globe*, 2d Session, 39th Congress, p. 1394.

because Congress refuses to let them in,—are to be bound by a fundamental constitutional law binding upon them, which has been imposed on them by two-thirds or three-fourths of the Legislatures of other States, who happened to be represented, is a proposition which . . . . cannot bear discussion.

"Sir, it is fundamental, vital; it goes to the question of existence of the union of the States; it assumes that these are not States of the Union, having any right to a voice in the fundamental law of the land." [1]

Mr. Doolittle expressed his astonishment at the length to which Mr. Sumner was willing to go. He called attention to the act passed by Congress on the 10th of May, 1866, consenting to the transfer of two counties of Virginia to West Virginia. By that act Congress recognized not only the State of Virginia, but the Legislature of Virginia, "and the validity of the act of the Legislature of Virginia consenting to this transfer of territory."

"By every act of legislation during this whole war Congress has always recognized these States as States in this Union. There is no act upon the statute-books which declares anything else but that they are States in this Union." [2]

Mr. Hendricks asked Mr. Sumner at what date and by what act one of the Southern States ceased to be one of the United States. Mr. Sumner replied: "The act of secession followed by war." [3]

Mr. Hendricks then asked, "If this be so, how is it that the Congress of the United States could recognize the act of her Legislature [Tennessee] in ratifying" the Thirteenth Amendment "as is recited in the preamble to the resolution admitting the State of Tennessee to representation in Congress?" Mr. Sumner said he did not vote for but against that act.

After some further discussion the proposition of Mr. Sumner was voted down, receiving only seven votes,—Howard, Lane, Pomeroy, Sprague, Sumner, Wade, and Yates. The nays were twenty-five, and absentees twenty.[4]

Mr. Henderson then offered the Louisiana bill and sub-

[1] *Congressional Globe*, 2d Session, 39th Congress, p. 1395.
[2] *Ibid.*
[3] *Ibid.*, p. 1396.
[4] *Ibid.*, p. 1397.

mitted an amendment so as to include all the Southern insurrectionary States.[1] The Senate then adjourned at three o'clock A. M. of Saturday, February 16.

On the same day the Senate met at twelve o'clock M., and continued in session until twenty-two minutes past six o'clock A. M. of Sunday the 17th, at which hour the bill was finally passed.[2]

It ought to be remembered that the minority complained of these long sessions on these two legislative days, the 15th and the 16th, and made several motions to adjourn, assuring the majority there was no disposition to delay unduly the passage of the bill. Mr. Hendricks specially complained of being unwell, and unable, therefore, to discuss it.

Mr. Buckalew, on Friday, the 15th, after stating that the bill had come to the Senate within the last twenty-four hours, said: "I found myself able to give it only a hurried reading before it was called up for debate. Is it not a little remarkable that a bill in which the social and political condition of eight or ten million American people is involved should be driven through one branch of Congress under the previous question without opportunity for any extended debate, and should then be driven through the Senate under the discipline of an organization confined to a portion only of the members of our body, with some twenty-four or forty-eight hours only of consideration, amid the pressure of other duties that crowd upon us, and when our own overtasked physical powers scarcely enable us to give the subject even that attention which is necessary to vote upon it intelligently, much less to examine and discuss it properly?" [3]

Mr. Hendricks said: "If the Senator [Mr. Saulsbury] will give way, I will make a motion that the Senate adjourn; but before I make the motion I wish to suggest that this is no ordinary legislation in which we are concerned. It is, in my judgment, the gravest legislation that has ever occupied Congress. It is claimed by its friends to be the work of reconstruction of our government; it is believed by its enemies to be the work of destruction. Whoever of these may be right, this is true, that the subject is worthy of consideration.

[1] *Congressional Globe,* 2d Session, 39th Congress, pp. 1397-8.
[2] *Ibid.,* p. 1469.
[3] *Ibid.,* p. 1382.

It is now nearly two o'clock at night. The majority have occupied almost as much time as they say they desire, with the exception of the distinguished Senator from Massachusetts, as he intends to 'tear this amendment shred from shred and make it a logical absurdity.'" [1]

Mr. Sumner: "That it is, right on its face."

On the 16th the measure came up early. Mr. Doolittle made a great speech in opposition to the whole measure. It is too long and too important to be abstracted. It should be read as a whole.[2]

Mr. Davis,[3] of Kentucky, and Mr. Saulsbury [4] spoke with great force and eloquence against the bill.

Then Mr. Sherman offered an amendment as a substitute for the whole bill. This was offered late in the morning, Sunday, the 17th. It was offered immediately after the rejection of the Williams-Johnson amendment. This amendment, with an addition made by the Senate and the sixth section and the proviso to the fifth section which were added by the House, is the law as it finally passed.

The preamble to the bill averred that "No legal State governments or adequate protection for life or property now exists in the rebel States" [naming them] and that "it is necessary that peace and good order should be enforced in said States until loyal and Republican State governments can be legally established." [5]

It will be noted that this bill, as offered by Mr. Sherman and passed, established a military government in the Southern States, and by the fifth section enacted in substance the amendment offered by Mr. Johnson as it had been amended in the Senate. It provided for Negro suffrage in the forming of a convention to frame a new Constitution and also prescribed that the Constitution so framed should recognize it, but it left the calling of the convention to the State Governments as they then existed.

On the final passage of the bill the vote was yeas 29, nays 10. The title of the bill was amended on motion of Mr. Sher-

[1] *Congressional Globe,* 2d Session, 39th Congress, p. 1394.
[2] *Ibid.,* pp. 1440-46.
[3] Appendix to same, pp. 124-129.
[4] *Congressional Globe,* 2d Session, 39th Congress, pp. 1448-58.
[5] *Ibid.,* p. 1459.

man by striking out "insurrectionary" before "States," and inserting "rebel." [1]

On Monday, the 18th of February, as soon as the House met, the bill as amended in the Senate was reported to the House.

The Senate substitute was opposed by Mr. Stevens, Mr. Boutwell, Mr. Banks, and others, but, nevertheless, under the operation of the previous question, it was passed on the 20th, with the addition of section six and the proviso to section five as it now stands in the law, yeas 126, nays 46. [2]

The proviso of the fifth section, which was added by the House, prohibited all persons disfranchised from holding office by the Fourteenth Amendment, from being delegates to the Constitutional Convention, and from voting for delegates to that convention.

The sixth section, added by the House, declared that until the said States were admitted to representation in Congress any civil government there should be deemed provisional only and subject to the paramount authority of the United States to abolish or modify, control or supersede, and that in all elections under said provisional governments all persons entitled to vote under the fifth section, and none others, should vote, and that no person should be eligible to office under the provisional governments who was disqualified under the Fourteenth Amendment.[3]

When these amendments were reported to the Senate for its concurrence there was considerable debate thereon, and there was a diversity of opinion among the Republican Senators as to concurrence therein.

Mr. Sherman especially opposed with great force both concurrence and the referring of the difference to a conference committee. He desired first an adherence by the Senate to its amendments, with the view of allowing the House the opportunity of reconsidering its amendments. Replying to Mr. Sumner, he said: "Although in many Southern States the Negroes are in the majority, and if they have the intelligence, the vigor, and the firmness of the white men, they can vote down the white men; the Senator says he is not satisfied with

[1] *Congressional Globe,* Second Session, 39th Congress, p. 1469.
[2] *Ibid.,* p. 1400.
[3] *Ibid.,* p. 1399.

that. Now, what is asked? What was asked in the House of Representatives? That we shall disfranchise the white population and leave only the Negroes and the few loyal white people there are in the Southern States to vote? If that is the proposition, let us meet it boldly and manfully. Sir, the people of Ohio I know do not demand such a proposition. All they ask is that the Negro shall be protected in all his natural rights, and, as the highest means of protection, that he shall be secured the ballot. And, sir, no proposition can ever pass this Congress, and no bill can ever be sanctioned by the American people which will disfranchise the white population of the Southern States, with very few exceptions, and place the power of ten States in the hands of ignorant emancipated freedmen. We want neither black nor white oligarchies. Our people are willing to protect the freedmen, to secure them with military power, to give them money for temporary relief, to arm them with the ballot, to do everything that is necessary for their protection; but we are not willing to establish in this country ten States in which all the white people are disfranchised, and only the black can vote. When I say all, I mean practically all, because we know very well that there are comparatively few white men in the Southern States who have not been complicated more or less in the rebellion; and when you attempt to draw a line between white men, when you say that one class of white men may vote and another shall be excluded, you will find yourself involved in perpetual difficulty. It is impossible to draw any such line. . . .[1]

"We build reconstruction upon the broadest humanity and invite all men to take part in the work. So far as voting is concerned we proclaim universal amnesty in exchange for universal suffrage; and yet the Senator is not satisfied. What more did he ask a year ago? Nothing. If we exclude from voting the rebels of the South, who compose nearly all the former voting population, what becomes of the Republican doctrine that all governments must be founded on the consent of the governed? I invoke constitutional liberty against such a proposition. Beware, sir, lest in guarding against rebels you destroy the foundation of republican institutions. . . . Our path has been toward enfranchisement and liberty. Let us not turn backward in our course, but after providing all necessary

[1] *Congressional Globe,* Second Session, 39th Congress, p. 1563.

safeguards for white and black, let us reconstruct society in the rebel States upon the broad basis of universal suffrage." [1]

Referring to the disfranchisement as to holding office, as provided for in the Fourteenth Amendment, and stating his belief that it would not extend to more than six thousand, perhaps ten thousand, he asked: "Is not that enough? Is it not enough that they are humiliated, conquered, their pride broken, their property lost, hundreds and thousands of their bravest and best buried under their soil, their institutions gone, they themselves deprived of the right to hold office, and placed in political power on the same footing with their former slaves? Is not that enough? I say it is. And a generous people will not demand more." [2]

Yet they did demand more and Mr. Sherman concurred in the demand.

Mr. Sumner declared that he was willing to accept the amendment of the House as to suffrage, but he wished it understood that he would at all times insist on some more practical and direct way of applying the true principle of reconstruction.[3]

Mr. Sherman finally concluded to accept the House amendment, though it excluded, as he thought, unnecessarily a few people from voting, but this exclusion, he said, was "only at the first election for delegates to the convention, after that they can vote. . . . I was willing to see a few who had been most conspicuous in the work of rebellion excluded from holding office, but none from voting." [4]

Mr. Wilson, of Massachusetts, said: "I vote for this great measure as a whole heartily, but I should vote for it more joyously if no human being on earth was disfranchised by it." [5]

Reverdy Johnson wished that the state of affairs was different. "If I had my own way I would at once receive them [the Southern States] in this Chamber, with a heart full of conviction that they would be true to their duty to the country, and that they would promote its permanent interest. But I

[1] *Congressional Globe,* Second Session, 39th Congress, p. 1564.
[2] *Ibid.*
[3] *Ibid.,* p. 1626.
[4] *Ibid.*
[5] *Ibid.*

have not my way. I am obliged, therefore, to acquiesce in the decision of the majority of Congress, however erroneous or unjust I may believe that decision to be. . . . I shall give it my vote, not because I approve of it in the abstract or in the particular, but because I think I see in it a mode of rescuing the country from the perilous predicament in which it is now placed." [1]

Mr. Hendricks: "I think experience has shown us that the greatest difficulty in the way of the adoption of the constitutional amendment in the Southern States was that provision which required the great body of the people there to do an act, as they supposed, of dishonor." He referred to the clause disfranchising certain Southerners from office. He said: "When the people of the Southern States came to consider that amendment, the great body of them thought, 'If we adopt this, it will be to relieve ourselves from political disability and to secure to ourselves political power, at the same time sacrificing in these respects the men that we encouraged in the rebellion,' and they felt that it was a matter of honor that they should not agree to it." [2]

A proposition was made to amend the disfranchising clause by excluding from it all those who had been pardoned by the President. This was voted down. Finally the House amendment was agreed to by a vote of thirty-five to seven, absent ten.[3]

The President vetoed the bill, and it became a law over his veto on March 2, 1867.

Thus was enacted into the form of law the first scheme of reconstruction under Congressional authority, nearly two years after the war ended. In the interim there had been reconstruction, under the plan of Mr. Lincoln, adopted and carried out by Mr. Johnson. Under this the Constitutions of the several Southern States had been amended so as to conform to the amended Constitution of the United States. No complaint was made that the Southern State governments were not republican in form and consonant to the provisions of the Constitution of the United States. Governors, legislatures, judicial and ministerial officers, had been duly elected and ap-

[1] *Congressional Globe,* Second Session, 39th Congress, p. 1627.
[2] *Ibid.,* p. 1627.
[3] *Ibid.,* p. 1645.

pointed, and the State Governments were performing all the functions of State Governments under the Constitution. They had elected Senators and Representatives to Congress according to the forms of law. They were subject to and were paying taxes. The Federal Courts, which, by the laws of their organization, could only be held and exercise jurisdiction in States, were regularly held and judgments were rendered that were revisable and were actually revised in the Supreme Court of the United States; and, in short, all the relations existing between States and the Federal Government existed between each of them and the United States. The Congress had by a concurrent resolution denied to them only the right of representation in both Houses of Congress. Congress had submitted to them, equally as to the other States, amendments to the Constitution; they had ratified the Thirteenth Amendment, and that ratification had been accepted as valid. They had rejected the Fourteenth Amendment, and that rejection had not only been accepted as valid, but had been made the ground of accusation against them of a want of loyalty to the Union and the pretext for punitory legislation against them. In this submission Congress had, by a logical necessity, admitted that they were competent and loyal Governments. The scheme had been to enforce Negro suffrage on the Southern States alone, through a diminution of their representation in Congress, if it were not accepted by them. Yet they were left free to accept this diminution or avoid it by adopting Negro suffrage. No formal offer had been made to them, if they would ratify the Fourteenth Amendment, that they should be admitted to representation in Congress; but after they rejected that amendment it was claimed that the offer had been made, and their rejection of it was denounced and made the pretext for subjecting them to military rule and to an enforcement of Negro suffrage by direct Congressional action. If the Southern State Governments were in fact illegal, as averred in this bill, then it is evident that they had no power to act on these amendments to the Constitution. Being illegal, they were in fact mere usurpations, and were without authority to bind the people by participating in an act changing the fundamental law of the Union. To have done so would have been in fact a violation of the Constitution of the United States, which equally condemned usurpations and

an amendment of the Constitution, except by the valid and legal action of the States. Nor was their situation improved by the excuse afterward presented by Mr. Blaine, that ratification by them of the Fourteenth Amendment was sought, not as a valid act of ratification, but as testing the disposition of the people toward the Union, and as a qualification of the people for association with the other States in the Union. For if the State Legislatures were illegal, they represented no one, their acts bound no one, their action could qualify no one. More than this, there is no authority in the Constitution for submitting amendments to the Constitution to any ratifying power but to States, nor for any other purpose than for legal and valid ratification. There is no such thing known in the Constitution as submission of amendments to that instrument to States or to people in territorial divisions known as States, for the purpose of qualifying them to be States, or of testing the disposition of the people as to qualifications for Statehood. Such submission was, therefore, on that theory a violation of the Constitution, and action under it would have been equally a violation of that instrument. To reconstruct on that basis was to require the Southern States to commit a violation of the Constitution as a qualification for Statehood under it. The claim too that the Southern States were not States in the Union, and, therefore, not competent to act as States on the constitutional amendments, though avowed by many, was not recognized by the Senate, which in the main framed the bill. The proposition of Mr. Sumner to amend the bill so as to declare that three-fourths of the other States were competent to amend the Constitution was voted down in the Senate by a large majority, only seven members voting for it. The same proposition was contained in the Blaine amendment, which was lost in the House. Even those who professed belief in that position had no confidence in it. Mr. Kirkwood candidly avowed his fears that the Supreme Court would not sustain such a position.[1]

Such fear was well founded, for in the next year the case of Texas against White, 7 Wallace, 700, was decided, in which it was held that Texas was, and had been since her admission, a State in the Union as a State. That the Union was composed of "indestructible States." If so, then Texas and

[1] *Congressional Globe,* Second Session, 39th Congress, p. 1393.

the other Southern States must be counted in enumerating three-fourths of the States,—the number necessary to ratify an amendment to the Constitution.

There is nothing stranger than the action of the human brain when it is devoted to reconciling contradictory actions and theories in accordance with the attainment of a predetermined end. The majority in Congress had determined that the Southern States should not be admitted to representation in that body, except upon certain conditions that were intended to secure a predetermined end. That end was the enfranchisement of the Negroes in those States. This was an abandonment of the scheme as developed in the Fourteenth Amendment. That scheme looked to enfranchisement in those States by the action of the State Governments as then organized, or on failure of such enfranchisement, then to a diminution of the political power of those States based on that population. A choice was given between the two. Now it was determined that there should be no choice, but Negro suffrage was to be imposed through military rule. Mr. Sherman and other leaders of the majority were for universal suffrage and universal amnesty. They were for the exercise of this power by all male adults whether black or white, but with this difference, they were inflexible in the determination that all blacks should vote, but more pliant as to demands for exclusion of a portion of the whites. The bill as it passed the Senate committed suffrage to all, leaving, however, to the illegal State Governments power to disfranchise "for participation in the rebellion or for felony at common law."

So far as Congress was concerned, suffrage was to be universal, with a concession, however, to these illegal State Governments of the acknowledged rights of the State Governments to make the named exclusions.

The House, however, inserted the proviso to the fifth section, by which a large number of whites were excluded from suffrage for participation in rebellion, and both white and black felons were made eligible. Mr. Sherman and others of the majority were opposed to this proviso. Mr. Sumner wanted a more extended disfranchisement of whites who had engaged in the rebellion. In opposing this, Mr. Sherman, as has been seen, recurred to first principles. He declared that the exclusion of all the rebels would violate the maxim that

"all Governments must be founded on the consent of the governed." He "invoked constitutional liberty against such a doctrine," and warned the Senate to "beware, lest in guarding against rebels, you destroy the foundations of Republican institutions." Yet whilst proclaiming this doctrine, and admitting its application to rebels, he, with his associates, was without the slightest compunction enforcing in this very bill a Government without the consent of the governed, and enacting as a condition of release from military rule that these States should ratify, against their known wishes, an article amending the Constitution,—an article that made the most important change in their fundamental law.

The question of reconstruction seemed now settled. To have this settlement,—to have a distinct pledge, as is embraced in the fifth section of the Act, that on compliance with these terms military rule should cease and the Southern States be restored to the Union,—Reverdy Johnson, as we have seen, though opposed to the whole scheme, had voted for it.

The situation, then, was this: the Thirteenth Amendment abolishing slavery had become a part of the Constitution. The Fourteenth Amendment had been rejected by the Southern States and by several Northern States. The elections in the fall of 1866 had shown more than a two-thirds majority in Congress for the Republicans, and by that majority had condemned the President. These elections had given the endorsement of the country to the scheme of reconstruction embraced in the Fourteenth Amendment, and under the inspiriting influence of these elections the majority in the Senate ventured to pass the first Reconstruction Bill as above noted.

It will be well, however, to remember the extent of this scheme, to contrast it with the scheme of the Fourteenth Amendment that had been endorsed at the preceding election.

1. It provided for military rule, declaring the Southern State Governments illegal, whilst the Fourteenth Amendment was submitted to the then existing State Governments for their action, thereby recognizing their validity.

2. The present bill provided for reorganizing the State Governments on Negro suffrage, and on a partial, though very large, white disfranchisement. The Fourteenth Amendment made no disfranchisement as to voting.

3. The bill, however, left to the people of the States the initiation and the management of the proceedings for a call of the convention. Congress had not yet gone to the point of initiating these proceedings, taking control of the elections, and declaring the result.

On this point Mr. Sherman said: "The State communities are swept out of existence; and the people are required to proceed in their own way to form State governments."

"No machinery is provided, it is true; but we have three examples already in our own history of States being organized by the people without any previous enabling act. Here is an invitation to the people. They can call their party conventions, their State conventions, and finally by a movement of the people, without regard to their local Legislature or local tribunals, a constitutional convention can be convened, elected by all the people, and they can form a Constitution." [1]

4. It was still left to the States,—after they were thus reorganized, after their Constitutions had, as to suffrage, conformed to the requirements of the law, and after their admission to representation,—to change their Constitutions on the subject of suffrage according to their own views of propriety and safety. There were no fundamental conditions prescribed to be binding on the States after their admission to representation, in reference to suffrage or anything else.

[1] *Congressional Globe,* Second Session, 39th Congress, p. 1564.

CHAPTER VI

FURTHER MEDDLING

THE fortieth Congress met March 4, 1867, two days after this first reconstruction bill had become a law.

Immediately on the assembling of Congress, Mr. Sumner introduced resolutions that looked to furnishing the Negroes with homesteads from the lands of the Southern whites that were to be confiscated, and to a further restriction of the suffrage as against the whites. This action had been foreshadowed by Mr. Sumner in the debate a few days before, on the passage of the reconstruction bill.

The feeling was very strong among Republican Senators against reopening the question of reconstruction and adding new terms and conditions for the restoration of the Southern States. Evidently they were satisfied with what had been accomplished, with respect to both the rights of the blacks and the humiliation and ruin of the whites. Mr. Sherman, in resisting, as we have seen, the demands of Mr. Sumner for a further disfranchisement of the whites, had affirmed that it was enough that the Southern whites had been humiliated and conquered, their pride broken, their bravest and best slain, their institutions overthrown, they themselves disfranchised as to office, and their slaves made their political equals. Speaking of the bill just before its passage, he said: "I trust now . . . . that we may have a platform upon which the Southern people can build up society in the Southern States, and that our great and glorious Union may be again united, with all the States represented, with all the stars displayed upon our banner." [1]

Mr. Stewart had said the passage of the bill was a matter of congratulation. "I believe it is a grand measure of justice and generosity, and the passage of it is the greatest event . . . . that has happened since the surrender of Lee. I believe it will give us peace and prosperity. It frankly says to

[1] *Congressional Globe,* Second Session, 39th Congress, p. 1626.

the country that we have a plan of reconstruction, an honest, independent plan, in which all can see light, in which all can see justice, in which all can see mercy. Let the bill pass, and let the country be satisfied." [1]

This feeling was so strong that when the vote was taken on the resolutions of Mr. Sumner, only a few days after the passage of the bill, they were laid on the table without even a reference to a committee, by yeas thirty-six, nays ten. The nays were Cole, Howe, Morton, Pomeroy, Sumner, Thayer, Tipton, Wade, Wilson, and Yates. Among the absentees were Senators Edmunds and Guthrie.

Speaking on the resolutions of Mr. Sumner above referred to, Mr. Sherman said:

"By a solemn act of Congress, passed by three-fourths of both Houses, we have said to the people of the rebel States that if they comply with certain terms and conditions they shall be restored to representation in Congress. That offer is still pending. It has been made to them by the American people through their representatives in Congress. We cannot with propriety add to the stipulations of that offer or take from them. We are bound by that proposition, reasonably bound, not, perhaps, in law, because we may vary the proposition till accepted; but we have made them a proposition, and we are bound to give a reasonable time for acceptance, and then to execute it in good faith. . . . We have made them this offer. We are bound to carry it out in good faith . . . . When it is proposed to add new conditions, new stipulations, onerous burdens, we then do not act with them in a proper and ingenuous way. . . . I believe the public interests of this great nation demand that those States should be restored to representation, and I believe that the terms of reconstruction proposed by Congress are satisfactory to the people of this country. So far as we can gather from the newspapers and from all the evidences of public opinion, our constituents are satisfied with the offer we have made." [2]

Then he declared his willingness to vote, if necessary, for a bill perfecting the machinery for the process of reconstruction, providing for a call of a convention by Federal authority, prescribing voting by ballot, instead of *viva voce,* and the

[1] *Congressional Globe,* Second Session, 39th Congress, p. 1626.
[2] *Congressional Globe,* First Session, 40th Congress, p. 52.

registry of voters, and naming the qualifications of the members of the convention.

He said: "We have made them the offer; let them have a fair trial. If they should by fraud, or by the old fear by which they have kept a whole race in bondage, prevent them from sharing in that political power which we have given to them, we can hereafter protect the black people and the white people of the Southern States. In the meantime, we are bound, ... by every consideration of prudence, ... by every sentiment of honor, not to change the terms of our offer in any material respect." [1]

He further said: "Pass such laws in aid of your previous enactment as you see proper. Prescribe, if you please, the forms of voting by ballot, the mode of organizing the convention, and all the machinery that is required . . . . but let us not add one jot or one tittle to the stipulations contained in the offer we have made. Let us stand by it." [2]

Mr. Howard, of Michigan, was equally emphatic, saying: "We have made an honest, out-and-out proposition to the Southern people, black and white, proposing to them the means by which they can restore themselves to participation in the government of the United States as States of the Union; and for one, sir, I am for keeping the pledge. It was made deliberately, and I shall be the last man to violate the pledge or attempt to retract it.

"Nor will I attempt to superadd to this act of reconstruction conditions which we did not impose at the time and which the bill itself does not contemplate; because that would be equally a departure from that *uberrima fides* which alone becomes the Senate of the United States and the legislation of Congress on a subject so grave, so important." [3]

The views of these distinguished Senators were confirmed by the Senate on the vote, laying the resolutions of Mr. Sumner on the table, as before noted.

It was thus adjudged by the solemn vote of the Senate, thirty-six to ten, that this bill was the finality of reconstruction; that no new terms and conditions would be imposed; that not one "jot nor tittle" should be added as conditions of re-

[1] *Congressional Globe*, First Session, 40th Congress, p. 53.
[2] *Ibid.*
[3] *Ibid.*, p. 56.

construction. And to this, as the final act, it was adjudged by solemn vote of the Senate that Congress was bound by "every sentiment of honor" and that the pledge must be redeemed.

It will be seen hereafter how this pledge of honor was observed.

Two supplementary reconstruction Acts were very soon passed. The first,—which was passed March 23, 1867,—took the whole machinery of reconstruction out of the hands of the people of the Southern States and placed it in the hands of the military. It provided for registration of voters, for the holding of the elections for delegates to constitutional conventions, for the meeting of the conventions, and for the submission of the proposed constitutions to popular vote.

It added to the terms on which, according to the first Act, the States were to be entitled to representation by prescribing in addition to those terms:

1. That it should appear to Congress that the election or ratification of the Constitution was one at which all the registered and qualified voters had an opportunity to vote freely and without restraint, fear, or the influence of fraud, and

2. That Congress should be satisfied that such Constitution meets the approval of a majority of all the qualified electors of the State, though, by the bill, the ratification was sufficient if voted for by a majority of those voting at the election, if one-half of the electors should vote.

These additions were material. Congress by them was made the final judge of the election, instead of a body of agents appointed by the people as provided in the first Act. Under it Congress reserved the right to refuse admission to the Representatives of the Southern States, if it should determine that any voter was influenced by fraud or fear. And, what is most important of all, Congress reserved to itself the power to determine,—whatever might be the result of the election, and notwithstanding there was no improper influence or fraud,—whether the Constitutions met the approval of a majority of all the electors in the State, including those not voting, when in fact the first law only required as a requisite to the validity of the election that one-half of them should vote. So tremendous a power reserved,—resting on the unrestrained discretion of Congress, including in it the power

to inquire into the opinion and wishes of those who refused or neglected to vote,—when properly considered was a plain violation of the pledge of honor to admit on certain defined conditions, as well as a reservation to Congress of the power to act on that matter according to its discretion. And it was so understood in the South.

So, in less than a month after this solemn pledge was renewed by an almost unanimous consent of the Senate, commenced that systematic violation of the honor of Congress that continued with ever increasing violation of the public faith until the end.

The effect of this last-named act was to take from the Southern people all control over the elections and to make the result of their action on the offer made by the first Act to give them representation in Congress depend on what the military should certify, and on what Congress itself should in its own discretion, with or without evidence, determine. The only act the Southern people could do in the way of acceptance or rejection of this offer was to vote at the polls. Being thus relieved from all power, they were also relieved from responsibility, except the personal responsibility arising to each person for the casting of his own vote. There was and could be no organized community or State responsibility, for the Southern people were not permitted to speak or act otherwise than as individuals each for himself.

The process of reconstruction began. During this process the Attorney General of the United States gave opinions as to the true meaning of the Acts.

The Attorney General interpreted the first reconstruction Act as not intended to set aside the State governments, which he claimed were recognized by the Act as provisional. He also decided that persons who had held executive, judicial, and legislative offices, but who had not taken an oath to support the Constitution, were not disfranchised. The Attorney General had also held that municipal officers were not included.

These opinions were unsatisfactory to Congress. They gave a construction to the reconstruction Acts more favorable to the Southern people than suited the majority. Hence a second supplementary reconstruction law was passed July 16, 1867. This bill declared the State governments illegal, and that, if continued, they were to be subject in all respects to the

military commanders of the district and to the paramount authority of Congress.

It also gave the General of the Army and the commander of the district, with the approval of the General of the Army, power to remove any officer of those States and to detail an officer or soldier of the army to act in his stead, or to appoint any other person to perform the duties of the office; and it confirmed the prior acts of those commanders in removing State officials and appointing others in their stead.

It declared that legislative, executive, and judicial officers of the States afterward engaged in rebellion should be disfranchised whether they had taken the oath to support the Constitution of the United States or not; and that "executive and judicial office in any State shall include every civil office created by law for the administration of any general law of the State or for the administration of justice." It also provided that no pardon or amnesty granted by the President should have the effect of taking away the disability occasioned by rebellion; and that the district commanders and all officers acting under them should not be bound in their action by the opinion of any civil officer of the United States (meaning the Attorney General); and that all the officers appointed or detailed to act, or elected in said States, should take the oath required of officers of the United States that was commonly called the iron-clad oath.

There was considerable debate on this bill whilst it was pending. It was shown by Mr. Conkling and others that the provisions allowing the district commanders to appoint to office in the Southern States was in violation of the Constitution of the United States requiring all officers to be appointed by the President, the head of a department, or a court of law.

Mr. Wilson offered an amendment declaring all the offices in those States vacant at the end of thirty days. This was not adopted, but the provision above noted, giving power to the General of the Army and the District Commander to remove them, was adopted in its place. In reference to Mr. Wilson's amendment Mr. Frelinghuysen declared, as to the retaining of the State officers, that there was no substantial difference. He declared he would not vote for it, even if he believed it wise, for he would "not add to what we declared to the South should be a finality."

He declared also that he had no doubt "that the public will say that by the passage of the bill under consideration we have added to the reconstruction measures of the last Congress," but he went on to show that the view was incorrect.[1]

[1] *Congressional Globe,* First Session, 40th Congress, p. 530.

CHAPTER VII

RECONSTRUCTION UNDER THESE LAWS

In pursuance of these several Acts of Congress, which all became laws over the veto of the President, reconstruction proceeded in the several Southern States, except in Tennessee, which on July 24, 1866, had been admitted to representation in Congress under a Constitution framed in pursuance of the plan of Mr. Lincoln.

ARKANSAS

The State of Arkansas, on June 22, 1868, was admitted to representation by an act passed on that day over the President's veto.[1] The preamble to the Act declared that the people of Arkansas had, in pursuance of the reconstruction laws of Congress, adopted a Republican Constitution and that the Legislature of the State had ratified the Fourteenth Amendment, and that therefore it was enacted that the State was entitled and admitted to representation in Congress as one of the States of the Union on the following fundamental condition: "That the Constitution of Arkansas shall never be so amended or changed as to deprive any citizen, or class of citizens, of the United States of the right to vote, who are entitled to vote by the Constitution herein recognized, except as a punishment for such crimes as are now felonies at common law, whereof they shall have been duly convicted under laws equally applicable to all the inhabitants of said State: Provided, that any alteration of said Constitution prospective in its effect may be made in regard to the time and place of residence of voters."

[1] U. S. Statutes at Large 15, Chap. 69, pp. 72 and 73.

NORTH CAROLINA, SOUTH CAROLINA, LOUISIANA, GEORGIA, ALABAMA, AND FLORIDA

Three days after the admission of Arkansas,—to wit, on June 25, 1868,—an Act was passed over the President's veto for the admission of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida.

The preamble was the same as in the case of Arkansas, and the fundamental condition was also the same, except that as to Georgia there was a further fundamental condition requiring the Legislature of Georgia to assent to a declaration made in the Act that certain portions of its Constitution that related to private debts should be null.

The admission under these Acts was conditioned on the ratification by the several State Legislatures of the Fourteenth Amendment.

The Constitution of Arkansas disfranchised as to suffrage and holding office all those who were disfranchised as to office by the Fourteenth Amendment or from voting under the reconstruction laws, and those who took an oath of allegiance to the United States or gave bonds for good behavior during the rebellion and afterward gave aid, comfort, or countenance to those engaged in the rebellion.

The Constitution of Alabama disfranchised as to voting and holding office:

1. Those who during the late war violated any of the rules of civilized warfare.

2. Those that were disqualified as to office under the Fourteenth Amendment, and were disqualified as to voting under the reconstruction Acts, "except such persons as aided in the reconstruction proposed by Congress and accept the political equality of all men before the law." The Legislature was empowered to remove disabilities under this clause.

The Constitution of Georgia contained no disfranchisement on account of rebellion.

The Constitution of Louisiana disfranchised, as to both voting and holding office, all those who under General Butler's order had elected to register themselves as enemies of the United States; leaders of guerilla bands in the late rebellion; those who in advocacy of treason wrote or published newspaper articles or preached sermons during the rebellion; and

those who in any State voted for or signed ordinances of secession,—"unless such persons shall sign and file in the office of the Secretary of State and publish in the official Journal a certificate setting forth that he acknowledges the late rebellion to have been morally and politically wrong, and that he regrets any aid or comfort he may have given it," with a proviso excepting from disfranchisement all persons who, prior to July 1, 1868, favored the execution of the reconstruction laws of the United States and openly and actively assisted the loyal men of the State to restore Louisiana to her position in the Union.

The Constitutions of North Carolina and Florida gave suffrage without discrimination as to acts in aid of the rebellion.

The Constitution of South Carolina disfranchised from voting all those disfranchised as to office by the Fourteenth Amendment.

It will be noted that at the same time that these several Constitutions were adopted by the people of these States members of the Legislature and other State officers were elected. The Act required these Legislatures to meet within twenty days after the passage of the Act unless sooner convened by the governor. When they acted by ratifying the constitutional amendment the President was by proclamation to declare the fact.

These proclamations were issued by the President as follows:

As to Florida, on July the 11th, 1868.

As to North Carolina, same date.

As to South Carolina, on July the 18th, 1868.

As to Louisiana, same date.

As to Alabama, on July the 20th, 1868.

As to Georgia, on July the 27th, 1868.

On the 20th of July, 1868, the Secretary of State issued a proclamation reciting the ratifications, withdrawals of ratifications, and rejections by certain States of the Fourteenth Amendment, and declaring that, if the withdrawals were invalid, then the Fourteenth Amendment was a part of the Constitution of the United States.

On July the 21st, 1868, Congress passed a concurrent resolution reciting: "That the Legislatures of the States of Con-

necticut, Tennessee, New Jersey, Oregon, Vermont, West Virginia, Kansas, Missouri, Indiana, Ohio, Illinois, Minnesota, New York, Wisconsin, Pennsylvania, Rhode Island, Michigan, Nevada, New Hampshire, Massachusetts, Nebraska, Maine, Iowa, Arkansas, Florida, North Carolina, Alabama, South Carolina, and Louisiana, being three-fourths and more of the several States of the Union, have ratified the Fourteenth Amendment, ... and, therefore, Resolved, that the said Fourteenth Article is hereby declared to be a part of the Constitution of the United States and it shall be duly promulgated as such by the Secretary of State."

In accordance with this, Mr. Seward issued the required proclamation on the 28th of July, 1868.

On July the 20th, 1868, Congress passed over the President's veto an Act depriving each of the insurrectionary States of the right to vote in the Presidential election then pending, unless it should have been reorganized under the reconstruction laws and "shall have become entitled to representation in Congress in pursuance of said Acts."

Virginia, Texas, and Mississippi were still unreconstructed.

CHAPTER VIII

DEBATES AND ACTION ON THE RECONSTRUCTED STATES

Some allusion has been made in reference to the material changes made in the supplementary Acts of reconstruction and to the wide discretion reserved by them to Congress. To understand fully these changes it is needful to state some of the important facts connected with the passage of the Joint Resolution of Congress admitting Tennessee to representation in Congress.

Under the administration of Mr. Lincoln, and in pursuance of his plan, in February, 1865, a convention was held in Tennessee to remodel its Constitution. The remodeling consisted in amendments to the existing Constitution. By these amendments suffrage was confined to whites, except that power was given to the Legislature at its first session under the amended Constitution to prescribe qualifications for voters and limitations on the elective franchise. The amended Constitution disfranchised many whites. Each elector was required to take an oath that he was an active friend of the United States and an enemy of the Confederate States; that he rejoiced in the triumph of the armies and navies of the United States and in the defeat and overthrow of the Confederates; and that he would cordially oppose all armistices or negotiations for peace with the rebels until the Constitution of the United States and all laws and proclamations in pursuance thereof should be established over all the States and Territories of the Union.

The Legislature ratified the Thirteenth Article of Amendment, and the amended Constitution abolished slavery in Tennessee.

Tennessee had,—according to the announcement made by Mr. Bingham, of Ohio,—prohibited the assumption or payment of the rebel debt and the enslavement of men, ratified the Thirteenth Amendment, conformed her Constitution and

laws to the Constitution and laws of the United States, and disfranchised rebels.[1]

In this condition Tennessee had applied to have her Senators and Representatives admitted into Congress.

A resolution was reported by the Reconstruction Committee to effect this restoration. That resolution[2] recited the formation of the Constitution as above stated, on February the 22d; declared that it was Republican in form, that a State government had been formed thereunder which proclaimed and denoted loyalty to the Union, and that the people thereof were found to be in a condition to exercise the functions of a State in the Union; and then it provided that Tennessee "is hereby declared to be one of the United States of America, on an equal footing with the other States, but on the express condition that Tennessee should maintain and enforce in good faith the existing Constitution and laws excluding rebels from the elective franchise and from office, for the respective terms provided for; and that the State should never assume or pay any debt contracted in aid of the rebellion, nor claim compensation for emancipated slaves; and that this condition be ratified by the Legislature of Tennessee before the resolution should take effect."

It was found expedient, however, by the members of the majority to get rid of this preamble. Mr. Bingham moved a substitute that was adopted and that entirely omitted the conditions above noted.

Mr. Boutwell opposed the resolution mainly on the ground that the Constitution of Tennessee was not Republican in form, on account of the disfranchisement of Negroes. Among other results of this disfranchisement he stated this: "And I bid the people, the working people of the North, the men who are struggling for subsistence, to beware of the day when the Southern freedmen shall swarm over the borders in quest of those rights which should be secured to them in their native States. A just policy on our part leaves the black man in the South where he will soon become prosperous and happy. An unjust policy forces him from home and into those States where his rights will be protected, to the injury of the black man and the white man both of the North and the South."[3]

[1] *Congressional Globe,* First Session, 39th Congress, p. 3980.
[2] *Ibid.,* p. 3948. [3] *Ibid.,* p. 3977.

Mr. Bingham, in reply, insisted that there should be equal rights for all the States, that Tennessee was entitled to equal rights with Ohio and Massachusetts.[1]

The substitute passed,—yeas 125, nays 12.[2]

When the resolution came to the Senate, Mr. Sumner offered as an amendment that the admission of Senators and Representatives was on the fundamental condition that there should be no denial of the elective franchise, or any other rights, on account of race or color.

That was voted down, only four voting for it,—Brown, Pomeroy, Sumner, and Wade.

It is thus seen that at this date, July, 1866, nothing more was required in the admission of a Southern State than the ratification of the Thirteenth Amendment, disfranchisement of rebels for a certain period, a repudiation of the rebel debt, and a disclaimer of all compensation for emancipated slaves. And it is most especially to be noticed that there was a distinct repudiation by both Houses of the pretension that the restoration of a State should be on a fundamental condition that restricted her exercise of any right reserved to her under the Constitution, and especially as to the elective franchise.

The resolution for the restoration of Tennessee passed July 24, 1866.[3]

We now return to the action and debates of Congress in 1868 with respect to the other Southern States.

The first bill that came up was for the restoration of Arkansas. It was shown in the debate that the Constitution in Arkansas had not been in fact ratified. There was an apparent majority for ratification, but there was such excess of votes cast over voters registered in two counties as to destroy the integrity of the election, this excess being larger than the apparent majority for the Constitution. Nevertheless, it was deemed proper to restore Arkansas. This act of restoration in fact put in power for four years the men who had been elected at the time of ratification, and who, it was charged, managed and controlled the election in their own interests. So far as these four States were concerned everything was safe enough; but after that it was doubtful. So resort was

[1] *Congressional Globe,* First Session, 39th Congress, p. 3980.
[2] *Ibid.*
[3] XIV Statutes at Large, p. 364.

had for the first time to the idea of a fundamental condition that had been repudiated in the case of Tennessee with such singular unanimity.

In the Senate there was a great debate on the validity of these fundamental conditions limiting the sovereignty of a State. All the great lawyers of that body, except Mr. Edmunds and Mr. Stewart, concurred in their invalidity.

Mr. Morton, among other things, said:

"The right to regulate the question of suffrage belongs to the States under the Constitution. . . . Another right belongs to the States. . . . It is . . . . a right to alter and amend their Constitutions at pleasure, so that they do not change their republican character. . . . The [United States] Government has no right and it has no power to impose a fundamental condition on any State by which the State parts with any right which it has under the Constitution of the United States. A State cannot alienate her rights under the Constitution of the United States any more than a man can alienate those great natural rights that belong to him." [1]

He said the theory on which the fundamental condition was supported "will destroy this Government; destroy the equality of the States. . . . The symmetry of the Government is gone." [2]

He further said: "That this legislation would be a blemish upon the legislation of Congress, that it would form a dangerous precedent." [3]

Mr. Conkling made a great argument against the validity of the fundamental condition. He referred to and commented on the various decisions of the Supreme Court on the subject, some of which had been cited by Mr. Edmunds.

Referring to the phrase "on an equal footing with the other States" as having originated in an Act of Congress, he said: "No matter, sir; usage makes law, and I do not stop to inquire the origin of this phrase. We all know that inwrought with the genius of our Government, imbedded in our organism, written in the Constitution again and again, is the equality of the States in all the attributes attaching to States as such . . . . That to the people of Arkansas, and to no

[1] *Congressional Globe,* Second Session, 40th Congress, p. 2603.
[2] *Ibid.,* p. 2742.
[3] *Ibid.,* p. 2743.

other earthly tribunal, belongs the right, so long as they continue their government republican in character, to modify it, to change it, to rearrange it, to adapt it, as they please, to the wants which from time to time present themselves." [1]

Mr. Buckalew, Mr. Hendricks, Reverdy Johnson, Mr. Doolittle, and others made great speeches against the fundamental condition.

Mr. Trumbull, the chairman of the Judiciary Committee, who reported the bill, admitted that the condition was unconstitutional, but said, nevertheless, that he would vote for the bill with the condition in it. He said, referring to Mr. Doolittle's position that the fundamental condition was unconstitutional: "I do not know that I would disagree with the Senator from Wisconsin on that point. I believe the people of Arkansas will have the same right to change their Constitution when they are recognized as having a State government entitled to representation in Congress as the people of Wisconsin, or the people of Illinois now have, and I am very sure that the people of my State [Illinois] claim the right to regulate suffrage for themselves. I think the people of Arkansas will have the same right.[2] . . . . I shall vote for the bill as it came from the House if the Senate shall not strike out the condition, yet since the Senator from Connecticut [Mr. Ferry] has moved to strike it out, I shall be compelled to vote for the motion, because I regard it as a condition that cannot be enforced." [3]

Mr. Edmunds made a strong argument in favor of the constitutionality of the condition. He cited and relied on Green v. Biddle, 8 Wheaton's Reports.

Mr. Edmunds, in opposing the admission of Arkansas until the Fourteenth Amendment had become a part of the Constitution, alluded to the fact that it had not yet been ratified by three-fourths of all the States, and to the contention of some that only three-fourths of the States represented in Congress was all that was required, and said:

"It is contended by another class of statesmen and jurists, whose purity is not to be questioned, that the Constitution plainly means that three-fourths of the States is three-fourths

[1] *Congressional Globe,* Second Session, 40th Congress, p. 2666.
[2] *Ibid.,* p. 2699.
[3] *Ibid.,* p. 2700.

of all the States, and, therefore, in order to have it become a part of the Constitution, you must have twenty-eight States assent to it, instead of nineteen, or whatever the number otherwise would be. I confess, Mr. President, that the inclination of my mind is, if it is of any value to anybody to know it, in favor of the latter proposition. I hold myself ready to change my opinion if I shall be convinced, or that inclination, if it shall turn out to be wrong." [1]

Attention has been called to the declarations of Mr. Sherman, Mr. Howard, and others against adding to the terms of reconstruction. The plighted faith of the government, as argued by them, to restore the right of representation to the Southern States on their complying with the terms of the reconstruction laws was also urged against the adoption of this fundamental condition.

Mr. Ferry, of Connecticut, moved to strike out that condition from the bill, and in support of that he said:

"Mr. President, the bill as proposed to be amended . . . . is in exact accordance with the reconstruction laws passed by Congress during the last year and a half, and is in fulfillment of the pledge given over and over again by this Congress that upon compliance with certain conditions these States should be admitted to representation in Congress and to all Federal functions; and it is because, among other things, I do not wish to see the plighted faith of Congress, the plighted faith of the great party to which I belong, and connected and bound up with which are all the interests of this country, broken by this same Congress, that I wish to have the bill passed without imposing further conditions than our former legislation had imposed." [2]

He also declared the condition unconstitutional.[3]

On the motion to strike out the condition, the ayes were 20 and noes 21.[4]

The same fundamental condition was embraced in the Act restoring the other Southern States above mentioned.

That Mr. Ferry was right in declaring that the imposition of this fundamental condition was a violation of the plighted

[1] *Congressional Globe,* Second Session, 40th Congress, p. 2662.
[2] *Ibid.,* p. 2628.
[3] *Congressional Globe,* First Session, 40th Congress, p. 2628.
[4] *Ibid.,* p. 2701.

faith of Congress as contained in the reconstruction laws is too clear for controversy. It was a great deal more than the addition of a "jot or tittle" to the terms of reconstruction that Sherman had solemnly said would be a breach of honor on the part of Congress; it was a substantial and material variation of the terms of reconstruction in that it required the States to surrender as a condition of restoration to their normal relations to the Union an essential part of their sovereignty, the possession of which by them was needful to their safety. This condition, if valid, made these States unequal in the Union and deprived them of powers deemed essential to the welfare of all the others. If invalid, it was a clear usurpation of power with the design of menacing the Southern States with a total loss of representation in case they exercised a clear constitutional right. This imposition was made by a Congress composed of Senators and Representatives from States claiming and enjoying the full sovereign right of regulating suffrage at their will, States that had, in the exercise of this power, with singular unanimity rejected in their own borders the suffrage that they thus attempted to impose on others, and did impose so far as an act of Congress could impose it. The condition, it must be remembered, was not simply the imposition of Negro suffrage without discrimination, as between them and the whites, but it was the imposition of universal Negro suffrage thus taking away, or assuming to take away for all time to come, the power of the Southern States to require such qualifications for voters as education, good character, and payment of taxes,—qualifications that had been imposed by many of the Northern States, and especially by Pennsylvania, Massachusetts, Connecticut, and Rhode Island. The condition imposed, is, indeed, as I believe, unconstitutional, and such is the opinion of Southern statesmen. Yet no Southern State, except one,[1] notwithstanding all that they have all suffered from a corrupt and ignorant Negro suffrage, has yet dared to disregard the condition.[2] The same contempt for constitutional obligations that inspired the imposition, it has been and is now feared, would endanger the status of the Southern States, if the condition be disregarded.

[1] See Mr. George's speech in defense of the Constitution of Miss. *Congressional Record*, 51st Congress, Second Session, pp. 1779-1828.

[2] Written about 1891-2.

But in all this legislation there is ample food for reflection, and I fear ample cause for alarm for the thoughtful patriot. It has been shown that the Senate solemnly repudiated the pretension of Mr. Sumner that the Constitution could be amended by three-fourths of the remainder of the States, after deducting those that had been in insurrection. It has been shown also that Mr. Edmunds, one of the greatest jurists that ever had a seat in Congress, entertained the opinion that amendments must be submitted to the Southern States, and that they had the constitutional right to act on them, and that their action was to be counted in making the ratification. It has been shown also that the Supreme Court had held that the Union was indissoluble and the States indestructible. It is a fact therefore that no amendment of the Constitution could be made except by the concurrence of some of the ten Southern States that had been in insurrection, even if all the other States should ratify it. So that it was essential to the validity of the amendment that some, at least, of the ten Southern States should ratify it.

The Constitution means, when it requires that a proposition to amend the Constitution shall be submitted to the States for their action, that it shall be submitted for their voluntary action, to be ratified or rejected by each State, according as its unbiased judgment shall determine. To deny this is to deny that this is a free Government. If Congress may not only propose amendments, but may take steps by force to compel any State to ratify them, Congress has full power to amend the Constitution as it may see proper. The submission to the States becomes an unmeaning form. If Congress may compel one State to accept an amendment, it may compel as many as it may deem needful. It is no answer to say that it may compel a State that has been in insurrection, but may not compel others. For if the Constitution, as Mr. Edmunds admitted and the Senate had decided, required the submission of the amendment to these States and made their assent essential to valid ratification, then it also required that such submission should be in accordance with the Constitution itself. It would be absurd to say that the Constitution required a submission in violation of its own provisions, that it required the assent of a State, and then that the assent of the State was not necessary. For if the assent of the State came not by its voluntary

action, but through force imposed by Congress, the assent was not the act of the State, but the mere act of obedience to an irresistible power. The Constitution requires no such useless formula.

The position of those who held that the eleven insurrectionary States were not to be considered in counting the three-fourths necessary for ratification was, at least, the more logical, and yet not less revolutionary. They held that these States were not States, or, at least, not States in the sense that they were constituents to which an amendment to the Constitution can, or ought to be, submitted. Holding this, they claimed, as Mr. Blaine expressed it, that the submission to them was not for the purpose of having an effective act done, to have a ratification of the amendment, but that their action of ratification, enforced on them by Congress, was only to be considered as an act qualifying them for restoration to the Union. But under this view the submission of the amendment to them was itself unconstitutional, for there is no warrant in the Constitution for the submission of amendments to any organization but States constitutionally qualified to act on them.

It is proper here to state the proceedings in Congress on this question.

On January 10, 1868, the President, in response to a resolution of the House of Representatives, sent in a message stating that the Fourteenth Amendment had been ratified by twenty-two States, Tennessee being the only State that had been in insurrection that had then ratified. Mr. Sumner, on the same day, January 10, introduced in the Senate a resolution, naming the twenty-two States that had ratified, and declaring that the Fourteenth Amendment had been duly ratified by three-fourths of the States, and was a part of the Constitution. This was referred to the Committee on the Judiciary, and was never reported on.

On January 13, Mr. Bingham introduced into the House a similar resolution declaring that the amendment had been duly ratified. This was referred to the Committee on the Judiciary, and was never reported back by that committee.

Matters stood in this way until July 18, 1868, when, after the ratification by Arkansas, Louisiana, Florida, North Carolina, and South Carolina, Mr. Sherman introduced a resolu-

tion declaring the Fourteenth Amendment adopted. This was referred to the Committee on the Judiciary.[1]

On July 20 Mr. Seward issued his proclamation reciting the ratification of the amendment by certain named States, as appears by "official documents on file" in the State Department, and reciting that it appeared from "documents" on file (omitting "official") that the amendment had been ratified "by newly constituted and newly appointed bodies avowing themselves to be and acting as the Legislatures, respectively, of the States of Arkansas, Florida, North Carolina, South Carolina, and Alabama," and reciting also the withdrawal of their ratifications by Ohio and New Jersey, and then stating that if the said withdrawals were invalid, then the said amendment was ratified and valid as a part of the Constitution of the United States.

Thereupon, on the same day, July 20, 1868, the resolution of Mr. Sherman was recalled from the Committee on the Judiciary, who had not then acted on it, and the resolution was made concurrent instead of joint, so as to evade the necessity of presenting it to the President, and it was then adopted in the Senate without a division.[2] This resolution recites a ratification by thirty-one States, naming them, and including Ohio and New Jersey, and also Arkansas, Florida, North Carolina, South Carolina, Alabama, and Louisiana,—"being three-fourths and more of the several States of the Union." [3]

On the next day the resolution was reported to the House, and under the operation of the previous question was passed without debate the same day,—yeas 127, nays 35.[4]

Thus did Congress finally settle that the Southern insurrectionary States were constitutionally competent to act upon the proposed amendment, and that three-fourths of all the States, including them, was necessary to a valid ratification.

The Ohio resolutions withdrawing the ratification of that State were presented in January, 1868. Mr. Sherman debated them on the line that they did not express the real opinion of the people of Ohio.

Mr. Sumner took the position that as nineteen States and

[1] *Congressional Globe,* Second Session, 40th Congress, p. 4197.
[2] *Ibid.,* p. 4266.
[3] *Ibid.,* p. 4266.
[4] *Ibid.,* p. 4296.

more (three-fourths of those having representation in Congress) had assented, the act of Ohio in withdrawing was not valid. Reverdy Johnson insisted that it took three-fourths of all the States, and that a State had a right to withdraw its ratification before the necessary three-fourths had assented, and thereby made the amendment a part of the Constitution.[1]

In the House the resolutions of withdrawal of Ohio were referred to the Committee on the Judiciary, without debate.[2]

On March 30, 1868, Mr. Haight, of New Jersey, presented the resolutions of the Legislature of that State, withdrawing its ratification of the Fourteenth Amendment. Mr. Haight tried to get the resolutions read, but only partly succeeded.

On motion of Mr. Washburne, of Illinois, the following resolution under the operation of the previous question was adopted:

"Resolved, That the resolutions of the Legislature of the State of New Jersey purporting to withdraw the assent of said State to the constitutional amendment known as the Fourteenth Amendment be returned by the Speaker of the House to the gentleman who presented it, for the reason that the same is disrespectful to the House and scandalous in character, and that its title only shall be referred to in the Journal of the House and in the *Congressional Globe*." The yeas were eighty, and nays seventeen.

It is well to note, however, that Mr. Washburne amended his resolution (as first offered) before the vote, by striking out the last clause in these words "and further that this House denies the constitutional right of any State Legislature to withdraw such assent." [3]

There are some other proceedings with reference to the reconstruction of the Southern States that are needful to be set out.

General Meade, the District Commander governing Alabama, reported as the result of the election in that State that the Constitution had been defeated; and he recommended that this convention be called together again, and a more liberal Constitution framed, which, if done, he thought would meet the approval of a majority of the voters in the State. He also

[1] *Congressional Globe*, Second Session, 40th Congress, pp. 876, 7, 8.
[2] *Ibid.*, pp. 890-1.
[3] *Ibid.*, pp. 2225-6.

called "attention to the difficulty of carrying on a government in a State where so small a proportion of those qualified to take part in the Government are in favor of the organic law." [1]

Mr. Stevens, in reference to Alabama, said:

"After a full examination of the final returns from Alabama, which we had not got when this bill was drawn, I am satisfied, for one, that to force a vote on this bill and admit the State against our own law, where there is a majority of twenty-odd thousand against the Constitution, would not be doing such justice in legislation as will be expected by the people."

And the bill on which he spoke, being for the restoration of Alabama, was amended so as to continue a provisional government, and require a resubmission of the Constitution to the people.[2]

Nevertheless, a bill embracing Alabama, Georgia, North Carolina, South Carolina, Florida, and Louisiana was passed, as before stated.

In opposition to this bill Mr. Beck spoke with great force and fullness of information. He urged the failure of the adoption of the Constitution of Alabama by the people. He spoke of the miserable constituency on which all these Constitutions were founded. He alleged that the men who composed the conventions in those States were men who had no substantial interests in the community, were adventurers and Negroes, a majority of whom could neither read nor write. Speaking of the Negro voters, he said: "They knew no more about the fundamental laws they were called upon to frame than so many horses or mules; a few managers and political tricksters, who monopolized the lucrative offices, controlled the whole. The fact appears in all the publications of the day, and is true beyond all peradventure, that hundreds and thousands of Negroes who came to the polls to vote for the Constitutions and the officers under them came from the plantations with halters in their hands, that they might lead home the mules they expected to receive; for forty acres of land and a mule were promised to every ignorant Negro who would vote for the Constitutions." [3]

[1] *Congressional Globe,* Second Session, 40th Congress, p. 2447.
[2] *Ibid.,* p. 2447. Speech of Mr. Beck.
[3] *Ibid.,* p. 2447.

Speaking of South Carolina, he said they had provided for common schools in which both blacks and whites were to be taught together, and that the whites that refused to send their children to these schools were subject to such penalties as a Negro legislature might impose. That whilst these legislatures were spending millions of other people's property, they do not bear a dollar of the burden. He showed that the whole amount of taxes paid by members of the Legislature was $700, of which $390 were paid by six members, leaving $310 for all the others. That the members of the constitutional convention all paid $879.54 of taxes, of which one man, a Democrat, paid $508.85, and three others paid $210.50, leaving $160.19 for all the others. He said that the maxim of South Carolina was, "Taxation without representation for the white man, and representation without taxation for the Negro." [1]

He urged with great force the objection based on the disfranchising clauses in the Constitutions of South Carolina and Louisiana.

Speaking of the disfranchisement of the whites by the Fourteenth Amendment, he said that it was found necessary for Congress to pass a bill removing the disabilities of five hundred and sixty in North Carolina, in order that the State Government under the new Constitution could be put in operation, and five hundred and forty-one in Georgia for the same purpose.[2]

Notwithstanding these objections, the bill for restoration of these States passed, as before stated.

In Texas and Mississippi the Constitutions framed by these conventions were so infamous, and the vote rejecting them so pronounced, that Congress, notwithstanding the most strenuous efforts of the local politicians, was obliged to hold them to be defeated.[3] But a new reconstruction bill was passed for those States after President Grant's inauguration, a bill in which he was authorized to have the Constitutions resubmitted, with certain clauses to be selected by him submitted separately.

[1] *Congressional Globe,* Second Session, 40th Congress, p. 2448.
[2] *Ibid.,* p. 2450.
[3] In Virginia, owing to a want of funds, the military commander could not hold an election.

Reconstruction was now complete except as to the three States of Virginia, Texas, and Mississippi, and it was reasonably certain that they, too, would soon be restored on the terms required. This was in July, 1868. Very soon afterward Senators and Representatives were admitted from all the States except those three, except that Senators were not admitted from Georgia until 1871.

This was due to the circumstances that surrounded the election of Senators by the first reconstructed Legislature of Georgia. Several members were chosen to that Legislature who were said to be ineligible under the Fourteenth Amendment. And as the military commander, General Meade, under whose direction the election was held, did not feel that he had the right to pass upon the question of their eligibility, he certified their election to the respective Houses. They all participated in the election of the United States Senators.

Very shortly afterward the white members of the Legislature combined their strength and turned out a good many negro members, which gave the whites complete control.

The State was refused admission to representation in the Senate until further measures for reconstruction were taken in her case, and these measures were not completed until 1871, when her Senators were admitted to their seats just a little while before the terms for which they were elected would expire.

It will hereafter be explained how Congress was enabled to push the reconstruction measures through by depriving the Supreme Court of jurisdiction of cases in which their constitutionality was involved. So nothing remained but the unbridled will of Congress to impose such measures as they deemed fit in order to complete the subjugation and humiliation of the Southern people, and to subject them to the rule of incompetent Negroes.

The effort had been all along, as the reader has seen, to unsettle and destroy the political power of the South. Negro suffrage in the beginning was not sought for as a main or principal end to be attained; it was a mere accessory. The Fourteenth Amendment had been framed on the idea of depriving the South of political power, so far as representation was based on Negroes, unless the Southern States by their own action would grant Negro suffrage. By this amendment the

choice was distinctly left to the Southern States to take diminished political power or Negro suffrage. It was hoped by some that Negro suffrage would be conceded, and then it was hoped that as, it was admitted, the Negro was wholly incompetent to act for himself, he would vote, as Mr. Fessenden expressed it, "under such good advice as might be given him." It was as certain as anything could be that, as he had been emancipated by the North against the will of his master, the Negro would go to the North, the Republican party of the North, for that good advice. In case, therefore, of his enfranchisement, it was certain that the whole mass of the Negroes in the South would have been added to the political power of the North, or rather of the dominant party in the North. In this way it was hoped that the Southern States would degenerate into mere provinces, not indeed visibly and by the forms of law governed and controlled by a force *ab extra,* and coming from the North, but by influence from the same quarter exerted on blind, prejudiced, weak, and ignorant Negroes.

It is to be deplored that this proposition of Negro suffrage or diminished political power was not submitted singly and alone to the Southern States, and without the addition of other terms that involved disgrace and dishonor to the Southern people. For the proposition, however intended, was reasonable in the then condition of the country. The South could not reasonably hope to retain power based on a race to which she refused political rights, except as the result of a compact to that effect. The war had been waged on an idea that constitutional compacts in reference to slaves and Africans would not be observed, and the Southern States would probably have concluded, if that question alone had been put to them, that, as they granted no political power to the Negro in their own borders, it would be proper to surrender power based on the Negro in national affairs.

The Northern people were not enamoured of Negro suffrage. In all those States outside of New England the Negro was denied suffrage, except in New York, where he was required to have a property qualification. Even in New England,—in Massachusetts, Connecticut, and Rhode Island,—there were such qualifications required of voters as would have excluded ninety-nine in a hundred of the Negro adult males

in the South; and in Connecticut he was excluded because he was a Negro, however otherwise he might be qualified. Nor had the Northern mind been changed on the subject by the war. For after the war commenced propositions to admit Negroes to suffrage in Ohio, Illinois, Kansas, Michigan, Connecticut, and Wisconsin had been voted down by large majorities. Some of these States, if not all, were intensely Republican and anti-slavery. New Jersey and Ohio had withdrawn their assent even to the Fourteenth Amendment, and a few months later, October 15, 1868, Oregon withdrew hers. Besides this, as has been shown, it was avowed in Congress by Mr. Garfield, Mr. Wilson, Mr. Stevens, and others that the public feeling of the North was against it.

So when the Southern States had rejected the Fourteenth Amendment, and the President had been repudiated in the elections in the fall of 1866, it was determined to inflict Negro suffrage on them; it was essential that the leaders in the movement should so manage as not to alarm the North with the idea that Negro suffrage was to be imposed on that section. It has been shown that efforts in the very beginning were made by Mr. Stewart, Mr. Wilson, and others to impose Negro suffrage on the South alone.

But it will be remembered that when it was proposed in the reconstruction bills to impose Negro suffrage on the South, the effort was not to impose it irrevocably, but only during reconstruction, and in the Constitutions framed in the process of reconstruction. These Constitutions, being subject to amendment at the will of each State, could, therefore, have no eternal effect. They merely gave the Negro the franchise along with the whites, and left it to the States afterward to continue it or not, as should be deemed best, with the penalty, however, that if they rejected it they should lose political power to that extent. This was the view throughout until there had been Constitutions framed in Arkansas, Louisiana, Florida, Georgia, North Carolina, South Carolina, and Alabama, coupled with a State organization in each that was produced by reconstruction, and that was wholly subservient to the will of the dominant party in Congress. After these organizations had proceeded to the extent that it required only the recognition of Congress to make them the actual governing power for these States, and not before, the attempt was made,

through the fundamental conditions, as we have seen, to make Negro suffrage irrevocable in the Southern States.

But whilst these proceedings were going on,—in May, 1868,—the Republican National Convention met in Chicago and nominated General Grant for President. That convention was so strongly impressed with the conviction that the Northern States, however they might tolerate Negro suffrage when inflicted on the South, were utterly opposed to it themselves, as to adopt the following resolution:

"The guarantee by Congress of equal suffrage to all loyal (colored) men at the South is demanded by every consideration of public safety, of gratitude and of justice, and must be maintained, while the question of suffrage in all the loyal States properly belongs to the people of those States."

The sentiment was so strong in the North that this explicit denial of any wish to amend the Constitution so as to inflict Negro suffrage on that section was deemed essential. Mr. Conkling, as we have seen, had expressed it "that the genius of our institutions" required control by the States of suffrage in their borders.

CHAPTER IX

REPEAL OF THE LAW AS TO APPEALS TO THE SUPREME COURT

ANY account of the process of reconstruction that would omit that action of Congress that prevented a review by the Supreme Court of the constitutional questions involved would be defective indeed.

In order to cripple the Southern States as they had been reconstructed under the President's policy in the difficult task imposed on them by the sudden emancipation of slaves, Congress, on February 5, 1867, deemed it necessary to enlarge the appellate jurisdiction of the Supreme Court; and, accordingly, on that date passed an Act allowing appeals or writs of error to review the judgment of any circuit court in cases of habeas corpus, wherein it was alleged that the petitioner was restrained of his liberty in contravention of the Constitution or of any treaty or law of the United States.

W. H. McCardle, an eminent citizen of Mississippi, had been tried and convicted by a military commission organized under the reconstruction laws on charges of having incited to riot and disorder, impeding reconstruction, and so on, by publications in a newspaper of which he was the editor. Believing that his trial and conviction and imprisonment in a time of peace, and in a State in which the State and United States Courts were open and regularly held, was a deprivation of his liberty in contravention of the Constitution of the United States, McCardle sued out habeas corpus before the United States Circuit Court in Mississippi. That court, as well as all the United States courts that were then organized in the Southern insurrectionary States, deemed an Act of Congress superior to the Constitution of the United States. The Court, therefore, refused relief, and remanded McCardle to the custody of the military for punishment. McCardle, under this act of February 5, 1867, above cited, sued out a writ of error to have his case reviewed by the Supreme Court of the United States.

By this statement it is seen that the question for the decision of the Supreme Court was the constitutionality of the reconstruction laws establishing a military government under and by which reconstruction was to be effected. The question was of immense importance not only to the Southern people, who had thus been subjected to military rule in order to procure their assent to an amendment of the Constitution, but also to the people of the whole Union, whose fundamental law was, by such agencies, to be subject to abrogation or change.

The Supreme Court at that time was composed of eight Judges. They were Chief Justice Chase, of Ohio, and Associate Justices Nelson, of New York; Grier, of Pennsylvania; Clifford, of Maine; Swayne, of Ohio; Miller, of Iowa; Davis, of Illinois, and Field, of California,—who were all from the Northern States, five of them having been appointed by Mr. Lincoln after the war commenced. This, on merely sectional and party grounds, would seem to be sufficiently favorable to the action of Congress.

The immense importance of the question involved was seen at once by the dominant majority. The first effort was to get rid of the case by a plea to the jurisdiction of the court. Eminent counsel were engaged on behalf of the Government to sustain this plea. Among them was Judge Trumbull, the chairman of the Committee on Judiciary in the Senate, whose pernicious activity, directed by the highest professional attainments and the greatest talents, had wrought with fatal effect in causing the enactment of the most stringent provisions of the reconstruction laws. This jurist and statesman, for in both characters he appeared before the court, in arguing the motion to dismiss the case for want of jurisdiction, undertook to enlighten the court as to the motives for the enactment of the law of February 5, 1867, under which jurisdiction was claimed. In this way it was sought to limit the plain meaning of a statute by the suggestions of one of its authors as to what was designed by its framers.

He said: "What was the purpose of the act [of February 5, 1867]? We all know. It is matter of legislative, nay, of public history. It was to relieve persons from a deprivation of their liberty under State laws; to protect loyal men in the rebel States from oppression under color of State laws ad-

ministered by rebel officers; to protect especially those who had formerly been slaves, and who, under color of vagrant and apprentice laws in some of the States, were being reduced to a bondage more intolerable than that from which they had been recently delivered . . . ." [1]

The Supreme Court,—though five of its eight members belonged to the party dominant in Congress and they were all steadfast adherents of the Union in the late conflict,—was superior to the influence of such arguments. It had on more than one occasion before this, unawed and uninfluenced other than by its own conceptions of duty, stood firmly in defense of the Constitution. It did not fail to remember that it was "the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States," nor that it was the creation of the Constitution itself as the appointed tribunal "to decide between the Government of the United States and the Government of a State," "and that to insure its impartiality it was absolutely necessary to make it independent of the legislative power and the influence, direct or indirect, of Congress and the Executive." [2]

The Court unanimously sustained its jurisdiction under the Act above cited.

This decision would have subjected to this great court, the appointed arbiter in the last resort of all questions of constitutional power of the Federal Union, the validity of the reconstruction laws. As if conscious of the usurpation of power in the Reconstruction Acts, the leaders of the majority were determined that the validity of those measures should not undergo the scrutiny of that tribunal that had been designated by the Constitution to settle such questions. So when the case had been fully and ably argued on its merits on the second, third, fourth, and ninth of March, 1868, and was then in the consultation room of the Judges, and not yet disposed of, the following proceedings in relation thereto took place in Congress, which resulted in depriving the court of its jurisdiction and left Congress supreme, with no other restraint than their own unbridled will and inflamed partisan animosities.

The Senate had passed a short bill of one section only,

[1] 6 Wallace, U. S. A., p. 322.

[2] Chief Justice Taney, in Gordon *v.* U. S., 117 U. S. R., 700 and 701.

providing for a revision by the Supreme Court of the United States of all judgments rendered against any officer of the internal revenue for any act done by him and for money received by him and paid into the treasury of the United States. The object of this bill, as it will be seen, was solely to place internal revenue officers on the same footing exactly as to the right of appeal to the Supreme Court as customs revenue officers. It was a bill to enlarge, not to diminish, the appellate jurisdiction of the court.

On March 9, 1868, whilst the great argument in the McCardle case was being concluded before the Supreme Court this Senate bill was pending before a committee of the House. It would seem that the argument before the Supreme Court was such as to convince the friends of the reconstruction measures that the judgment of the court, if allowed to be pronounced, would be against the validity of these measures. For it was arranged that on the 12th of March, three days after the conclusion of the argument and the final submission of the McCardle case to the action of the court on its merits, Mr. Schenck should ask the unanimous consent of the House (which the Speaker had decided was necessary) to call up this Senate bill, saying it came from the Finance Committee of the Senate, and that he desired to pass it then. The bill was read, the substance being as stated above, referring alone to revision by the Supreme Court of judgments against Revenue officers.

The further proceedings from this point to the end, as set out in the *Globe,* are as follows:

"Mr. Schenck: I desire to make a word or two of explanation which I think will be perfectly satisfactory. As the law now stands, these appeals or writs of error can be taken in any case where one of the officers of the customs is concerned. But by some inadvertence of the law-making power, that cannot be done in the case of an internal revenue officer. This bill proposes to put those officers on the same footing in that respect; that is all there is in it. I hope there will be no objection to its consideration at this time."

"Mr. Stevens (of Pennsylvania) objected, but subsequently withdrew his objection.

"No further objection being made, the bill was taken up.

"Mr. Schenck: I suppose I need not repeat the explana-

tion of this bill which I made a few minutes since. The whole effect of it is to place officers of internal revenue on the same footing with officers of customs.

"Mr. Wilson (of Iowa): Will the gentleman from Ohio (Mr. Schenck) yield to me [Mr. Schenck had the floor] to offer an amendment to this bill?

"Mr. Schenck: I will hear the amendment.

"Mr. Wilson (of Iowa): I desire to amend the bill by adding to it the following:

"Section 2. And be it further enacted, That so much of the act of February 5, 1867, entitled 'An act to amend an Act to Establish the Judicial Courts of the United States, approved September 24th, 1789,' as authorizes an appeal from the judgment of a Circuit Court of the United States to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court on appeals which have been or may hereafter be taken, be, and the same is hereby, repealed.

"Mr. Schenck: I am willing to have the amendment received, and now I call the previous question on the bill and amendment. The previous question was seconded and the main question ordered. The amendment of Mr. Wilson of Iowa was agreed to. The bill, as amended, was then read the third time and passed.

"Mr. Schenck moved to reconsider the vote by which the bill was passed; and also moved that the motion to reconsider be laid on the table. The latter motion was agreed to." [1]

The above is the whole record on this subject. The duplicity and artifice by which the passage of this bill, with the amendment, was effected is fitly consonant with the purpose of its enactment, which was to take from the Supreme Court its jurisdiction to decide a case that had already been argued before and was then under advisement by that tribunal. This case involved the destinies of the people of ten States; and the belief that its decision, if permitted, would vindicate the constitutional rights of that people and save them from the consequences of military government was the motive for the artifice. The case had been heard; it was before the Judges under advisement. Its decision might be, and was likely to be, made in a few days. To introduce and carry a bill through all

[1] *Globe*, 2d session, 40th Congress, pp. 1859-60.

its legislative stages to a law before the decision was made would probably be impossible. At all events, it was impossible to accomplish this without the true character of the bill being known. So it was resolved to resort to artifice and deception to accomplish a purpose that was even more criminal than the means that was employed to obtain it. That the whole proceeding as above quoted from the *Congressional Globe* was but the acting out in the House of a scheme carefully prearranged in caucus cannot be doubted. Time was pressing; the McCardle case had just been argued and was in the consultation room. It was essential that the deprivation of jurisdiction of the court should be by amendment to a bill that had already reached the stage where it could be put on final passage. Only the unanimous consent of the House was necessary. This could only be obtained by calling up a bill so eminently fair, just, and necessary as to command the assent of all. This unanimous consent was obtained for the consideration of this proper and necessary bill by a simple explanation of its character, coupled with the avowal on the part of Mr. Schenck, who had it in charge, of a wish to pass now, at that time, the bill as thus explained. There was not a whisper of a suggestion that anything else than its passage as explained was desired or expected. A sham opposition was made to the taking up of the bill by a member, Mr. Stevens, whose whole record in the House for years had shown that he would stop at nothing that could humiliate the Southern people, or that could degrade the Supreme Court itself. He was the leader of the majority. No legislation affecting the welfare of the Southern people had passed or could pass without his scrutiny or even his approval. His objection, therefore, was an assurance at least to the members of the House not in the secret that the taking up of the bill did not mean that legislation was contemplated that would be adverse to the Southern people or degrading to the court. His objection, having served this purpose, was withdrawn.

The part played by Mr. Schenck was equally the part of artifice and deception. He admitted some days afterward in debate that, while he had not heard the amendment of Mr. Wilson read, he was cognizant of its meaning and effect. Yet when Mr. Wilson asked his permission to offer it, Mr. Schenck declined until he could hear it read, thereby affirming in the

strongest manner to the House his ignorance of its contents, and driving from the minds of the suspicious all idea that the amendment was offered as the result of prearrangement or collusion. But not content with this, he retained the floor until after the reading of the amendment, the effect of which neither he himself nor anybody else could understand without a reference to the statute, a part of which was repealed by it. He, then, immediately upon the enunciation of the last word of the amendment by the reading clerk, assented to its reception, and in the same moment called the previous question, which cut off all debate and all inquiry into the signification of the momentous legislation that he was causing to be enacted. The previous question was seconded by his party friends, the amendment was adopted, and the bill as amended, without further reading, was passed.

But the effect of all this artifice and deception would have been lost if time had been left for examination and reconsideration. So, immediately on the passage of the bill, Mr. Schenck moved a reconsideration, and in the same breath moved to lay that motion on the table. This last motion was instantly adopted, and thus all further parliamentary inquiry into the bill was closed out.

This extraordinary performance, however, was likely to excite attention and inquiry into the nature of the amendment. So it was determined that no time for this inquiry should be allowed to elapse before final action on the amendment in the Senate. So the bill was immediately sent to the Senate. The Senate was soon in executive session, wherein no outsider is allowed to intrude. It was engaged in one of those proceedings that it has determined are so solemn and serious and of such importance to the people that no profane eyes are allowed to witness them, and no profane ear is permitted to listen to them. Yet haste was so important,—lest before action on the bill by that body the true meaning of the amendment should be discovered,[1]—that after the Senate went into executive session legislative session was resumed before its executive business was concluded.[2] That this was

[1] The clerk of the House reported the bill as amended to that body in secret session.

[2] A report of that character is always made by a mere recital of the fact that the House has passed the bill with an amendment. The

done for the sole purpose of considering this bill and amendment is evident from the fact that as soon as the doors were opened the President *pro tempore* of the Senate laid before that body the bill as amended, and as soon as its consideration was over, the Senate resumed its executive session.

After the amendment was read the following proceedings took place, as is shown by the *Congressional Globe:*

"Mr. Buckalew: I observe that is a very important amendment. I do not know what the effect is. Before voting on it I should like to have some explanation. I observed that the Senator from Oregon [Mr. Williams] rose. I supposed with the intention of explaining what the amendment was. It seems to take away the jurisdiction of the Supreme Court in a certain class of cases.

"Mr. Williams: The amendment is one that has been adopted by the House of Representatives and explains itself. It provides in regard to a particular jurisdiction conferred by an Act passed in 1867, that so much of that act as confers that jurisdiction shall be repealed. It leaves the law of 1789 in full force and effect.

"Mr. Buckalew: I ask for the reading of it again.

"The Secretary read the amendment.

"Mr. Buckalew: As we have no leisure now to refer to that particular law, I think the Senator from Oregon ought to explain to us in what respect the Act of 1867 changed the former law; what additional jurisdiction it conferred, and what are the reasons now for withdrawing from the Supreme Court a jurisdiction which was, or may have been, conferred by the latter statute. The subject has not been referred to any committee; it comes to us as an amendment made by the House of Representatives. I move to postpone the consideration of the subject until to-morrow. At any rate I should like to have time to read the law which it is proposed to repeal.

"The motion to postpone was not agreed to.

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report gives no notice to the Senate of the character of the amendment. In such cases where such reports are made to the Senate in secret session the practice is to hear the report made by the clerk of the House and on his retirement, which always is immediate, the Senate resumes its executive business.

"The President *pro tempore:* The question is on the amendment.

"Mr. Buckalew: I ask for the yeas and nays.

"The yeas and nays were ordered, and being taken resulted: yeas 32, nays 6."

This is the whole record except the recording of the names on the yea and nay vote.

The Senate then immediately went again into executive session. Those proceedings in both Houses took place on March 12, 1868, and, looking from the record that contained all that was said and done, could not have occupied as much as ten minutes in both Houses.

It will be seen that the same tactics prevailed in the Senate that effected the passage of the bill in the House. Artifice and disingenuousness were practised to conceal the true character of the amendment in both Houses. In the Senate there was a direct appeal made by Mr. Buckalew for an explanation of the character and the force of the bill, an explanation of particular reasons for taking away the jurisdiction, and of the character of the jurisdiction to be destroyed. And there was a refusal to make any explanation at all. There was also an appeal made for postponement for a single day in order that he might examine for himself the amendment, which he had in vain asked the Senator in charge of the bill to explain. This was denied. An appeal was then made for time to get the statute and read it, and this was not granted. It will be observed that this appeal for information and explanation was not sympathized in by any of the Republican Senators. Every one of them was prepared to vote for a bill, without inquiry into its character and without information as to its meaning, unless, as is certain, this material amendment had been considered by them outside of the Senate, and its offering was the result of a prearranged scheme for the enactment of a law of the most important character without allowing its meaning and effect to be exposed to the Senate, or rather to the members of the opposition.

In this way and by these means, disreputable in the highest degree, was the Supreme Court deprived of its jurisdiction, and the decision of the most momentous constitutional

question ever submitted to a court was withdrawn from the tribunal appointed by the Constitution for its settlement.

These proceedings, with the attendant consequences, constitute a chapter in the history of the world that must arrest the attention of mankind.

In the great republic in the New World had grown up institutions framed by the liberty-loving Anglo-Saxon race to guarantee personal liberty, the free exercise of political and civil rights, "to insure domestic tranquillity and to provide for the common defense, promote the general welfare and to secure the blessings of liberty," to that race and its posterity forever. This Government had been framed and administered by that race through a written Constitution that had been recognized as the supreme law of the land. These institutions had been so organized by the aptitude and genius of that race for self-government that checks and balances,—equipoise of power,—were provided so as to insure minorities against oppression and ruin and hold majorities animated by passion and inflamed with the possession of undisputed powers within the limits of the great charter, the Constitution. Among these checks, and one of the most important and essential, was the Supreme Court of the United States, which had been made the final arbiter of the powers of the Government. The Court was provided for in the Constitution itself, and was, therefore, as much an essential organism of the Federal Government as Congress or the Executive. It was the head and the director and supervisor of the Judicial Department, which was itself a co-ordinate Department of the Government. It could not be destroyed except by a destruction of the Constitution itself. It could not be crippled or maimed in the exercise of its high functions of constitutional arbitrament in the last resort, but by a maiming and disfiguring of the scheme of the Constitution itself.

The Court was venerable and venerated both because of the men that then constituted its membership and because of the long line of illustrious judges that had preceded them. Here were ten millions of freemen of the Anglo-Saxon race that had framed the Constitution,—the countrymen and kinsmen of him who had led the armies of the Confederacy in its infancy and weakness through the struggle for independence,—the countrymen and kinsmen of Mason, Jefferson,

Madison, Marshall, Clay, and Jackson, and of a long list of illustrious warriors and statesmen who had rendered the greatest services to the whole country; these millions, through the appellant, were suitors before this august tribunal pleading for a share in that constitutional liberty that their fathers had established. These millions were the subjects of military rule in time of peace; they were denied the great writ of *habeas corpus* and the right of trial by jury, this denial being the appointed agency of forcing them to consent to such changes in the Constitution as were designed for their ruin and their humiliation. These millions had, in pursuance of what they believed to be the inalienable rights of freemen, sought safety outside of the Union. Their success had been prevented by irresistible force, wielded and applied under a solemn declaration of the Congress that the war on them was waged not for oppression or subjugation, or for the overthrow of their established institutions, "but to defend and maintain the supremacy of the Constitution of the United States and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired." They now appealed to this great court for the supremacy of the Constitution and for the unimpaired equality and rights of the States of which they were citizens.

This people had not always conceded that this Court was the final judge, *as against the States,* of constitutional questions, and in this view many of the Northern people had at one time concurred. They had leaned to the view of Mr. Jefferson, that the Constitution was a compact between the States, and that in all cases, as to the extent of the powers of the States as affected by the grant of power to the Federal Government, each State was the rightful judge for itself. On this theory they had acted in seceding, and on it they had been vanquished. On the other hand, those who then controlled the Government denied this State authority to judge of infractions of the Constitution, and asserted that the Supreme Court was the final arbiter. That had been the view of the victorious section. Yet now the vanquished, as a necessity of their defeat, relinquished their former opinions, assented to the view of the victor, and appealed to the tribunal that was asserted by their late antagonists to be legitimate. This tribunal was an established organism of the

Government of the United States. Every member of it had adhered to that Government in the civil war just ended. Five of the eight Judges belonged to the political party of the majority in Congress, and they all were citizens and residents of that section that had triumphed, and they all had concurred in the judgments of the Court that held that the war was constitutional and legitimate on the part of the United States. Not one of the Judges was from the Southern States, nor had any of them shown the slightest sympathy for the cause of those States. So if this great Court had prejudices, they were not in favor of the South. Besides this, it would have required the concurrence of five of the eight Judges to reverse the judgment under review and to establish the constitutional rights claimed by the South. The question involved grew out of the late war; the Judges were part and parcel of the victor, and the rights of the vanquished were at stake.

Yet such are the changes produced by revolutions in human affairs that the vanquished South, bereft of all other hope, and yielding to an inexorable necessity, sought protection for its rights as freemen under the Constitution from this great tribunal which, in the days of its power and equality in the Union, it had refused as the final arbiter; and the North, flushed with victory and inflamed with passion and revenge, now took away from the tribunal the jurisdiction that had been accorded to it. Men's passions were substituted for the Constitution. The policies of statesmen caused them to refuse obedience to the Constitution, to secure the supremacy of which they had made war. The South was not allowed to obey the very Constitution in the name of which its people had been vanquished.

CHAPTER X

PRESIDENTIAL ELECTION OF 1868

ALL the reconstructed States having been admitted to representation in the House, and all but Georgia having been admitted to representation in the Senate, there were but three of the Southern States,—Virginia, Mississippi, and Texas,—remaining wholly unrepresented.

We recur now to the Presidential election of that year. We recall the position of the Republican National Convention held in May, as expressed in the resolution hereinbefore quoted, at which it was announced that while Negro suffrage was to be inflicted on the South, yet the pledge of the party was given that each Northern State should retain its conceded power over suffrage within its own borders.

In pursuance of this policy of leaving the Northern States their full power over the elective franchise, while imposing Negro suffrage on the South, Congress had,—in July, 1868, as we have seen,—resorted to the unconstitutional expedient of imposing the fundamental condition in the acts admitting the reconstructed States to representation in Congress, whereby it was attempted to make Negro suffrage in those States irrevocable. Some reliance, it is true, was placed on the constitutional validity of these conditions, yet, as we have seen, many of the ablest Senators of the majority denied this, and the condition in the case of Arkansas,—that being the initial case,—failed to be stricken out by a majority of one vote only. The main reliance, however, was on the impossibility of recalling the right when once granted. This view was expressed with great force by Mr. Edmunds in a subsequent debate when opposing the Fifteenth Amendment.

He said: "In all the Southern States . . . . they [the Negroes] have acquired a right to vote under local Constitutions, to say nothing of the Fourteenth article; and they will never lose it except through a convulsion as great as any we

have lived to witness. . . . These people, therefore, in these ten States will maintain the practical exercise of the right to which they have been recently admitted; and there is no danger whatever except through the convulsion to which I have referred, and against that you have the constitutional power of the whole nation, which you are bound to exercise." [1]

Mr. Blaine gave expression to the same view on December 10, 1868, when he said, referring to Negro suffrage in the South: "It is too late to discuss Negro suffrage, for, having been granted, it is impossible to recall it. . . . It is demonstrably impracticable to withhold suffrage from the Southern Negroes, now that they have exercised it, without involving consequences which would destroy all security for life or property in that section for generations to come." [2]

The Democratic party in their National Convention on July 4, 1868, condemned in the strongest language the reconstruction laws as unconstitutional, revolutionary, and void.

It thus appears that the issue between the two parties in that canvass was on the reconstruction measures, with Negro suffrage in the South, the Republican party distinctly pledging themselves against any amendment to the Constitution that might affect the control of the Northern States over the subject for themselves.

The result of the election was 214 electoral votes for General Grant and 80 for Governor Seymour. Of the Northern States, New York, New Jersey, and Oregon,—representing 43 votes,—had voted for Seymour. Of the Southern reconstructed States, two,—Georgia and Louisiana,—had voted for Seymour. If there had been no reconstruction, the vote of the Southern States would all probably have been given for Seymour, and he would have been elected.

So after the election, and after the securing of a large majority in the Forty-first Congress, and after the legislatures of twenty-five States had been carried on the pledge as to suffrage contained in the resolution of the Republican National Convention before noticed, new considerations presented themselves to the minds of the Republican statesmen of the North.

[1] *Congressional Globe,* Third Session, 40th Congress, p. 1001.
[2] *Ibid.,* p. 58.

Then for the first time began to be considered seriously by the great body of these leaders the question of imposing Negro suffrage on the Northern States as well as on the South. A pledge, it is true, had been given to the country not to do this, yet the exigencies of the party were such that it appeared evident that something must be done to secure to the Republican party control of the country. Even the popularity of General Grant had not been able to save three of the Northern States. It was feared that the Negro vote would be necessary to turn the scale in their favor in many of the Northern States. This fear was scarcely concealed by Mr. Boutwell on the 23d of January, 1869, in his speech in advocacy of a bill to establish Negro suffrage by Act of Congress throughout the Union. In this speech he alluded to seventeen hundred Negro male adults of Connecticut, ten thousand in New York, five thousand in New Jersey, fourteen thousand in Pennsylvania, seven thousand in Ohio, twenty-four thousand in Missouri, four thousand in Delaware, thirty-five thousand in Maryland, who would rally to the support of the Fifteenth Amendment; and he asked: "Are we to decline the services of one hundred and fifty thousand men who are ready to do battle for us at the ballot box in favor of human rights?" [1]

The members of the Fortieth Congress had shown an especial pliancy to the demands of party leaders. They had concurred in all the most radical measures of reconstruction. The party had recently been sustained at the polls by the election of General Grant. It had elected a large majority in the House of Representatives, and it had nearly all the Senate. There were, too, twenty-five Legislatures elected, which were supposed to be obedient to their will, notwithstanding the platform before alluded to. Only three others were needed to insure the necessary three-fourths of the States to secure the ratification of an amendment imposing Negro suffrage on all the States. "We have then to secure three other States," said Mr. Boutwell, "in support of the proposition. We are to enter upon that work with a certain amount of prejudice against and traditionary opposition to Negro suffrage." [2]

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 561.
[2] *Ibid.,* p. 560.

The fear, too, was felt that if Negro suffrage were not imposed then by constitutional amendment, it could never be done. Mr. Bingham, urging concurrence in the Senate amendment, said: "You may never have another opportunity of presenting this question [of Negro suffrage] to the consideration of the American people." [1]

Mr. Butler said, "If we do not pass this now [the Fifteenth Amendment] as we receive it from the Senate, it will be too late forever to pass it." [2]

Mr. Frelinghuysen, supporting the statement of Mr. Stewart "that there was no time for further action," said: ". . . . and no chance at the next session . . . . because there will not be a two-thirds vote there for it," to which Mr. Stewart assented.[3]

Mr. Wilson, of Massachusetts, said: "We have twenty-five State Legislatures in the hands of our friends," and he advised that they "take the responsibility of submitting to the Legislatures a proposition to amend the Constitution so as to secure to the colored citizens of the United States the right to vote and to be voted for." [4]

So, under the pressure of the emergency that "now or never" was the time to impose Negro suffrage, the proceedings following were had on this momentous subject, in express violation of the platform on which the election was carried and the State Legislatures secured in twenty-five States. As to the three remaining States needed, there were Virginia, Texas, and Mississippi still under process of reconstruction, and it was deemed to be in the power of Congress to force them to agree to the Fifteenth Amendment, as was actually done at the next session by the passage of a bill,—Act of April 10, 1869,—making it a prerequisite to their admission to representation that they should ratify that amendment.[5]

On the third day of the first session of the Fortieth Congress,—that is, on March 7, 1867,—Mr. Henderson, of Missouri, had introduced Senate Joint Resolution No. 8, propos-

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1225.
[2] *Ibid.,* p. 1426.
[3] *Ibid.,* p. 1629.
[4] *Ibid.,* p. 1626.
[5] 16 U. S. Statutes at Large, Chap. XVII, pp. 40-41.

ing an amendment to the Constitution of the United States in the following words:

"That no State shall deny or abridge the right of its citizens to vote, or hold office on account of race, color, or previous condition."

There was added a section giving power to Congress to enforce this by appropriate legislation.

On its introduction the resolution was referred to the Committee on the Judiciary. In that committee it slept from March 7, 1867, to January 15, 1869, two years, lacking a few weeks. During all this interval all the reconstruction measures, except the first, had been passed. Reconstruction had actually taken place in all the Southern States except three, the Presidential election had taken place, and the Fourteenth Amendment had become, by the declaration of Congress, a part of the Constitution. The resolution's slumber had not been disturbed by all these events, but seemed rather to the superficial observer to have been made so profound as to prevent all chance of resurrection by the resolutions of the Republican National Convention, which in express words condemned the proposition contained in it.

On the last-named day, however, it was suddenly resurrected into life and activity. Mr. Stewart then reported it back to the Senate amended so as to read as follows:

"The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or any State, on account of race, color, or previous condition of servitude."

This was exactly the Fifteenth Amendment as it finally passed, with the important exception that the words "and to hold office" were stricken out, and they are, therefore, not a part of the Constitution of the United States.

The resolution as reported embraced the right to hold office.

Mr. Williams, of Oregon, moved a substitute that gave Congress the power "to abolish or modify the right to vote or hold office prescribed by the Constitution or laws of any State."[1] His object manifestly was to secure immunity to the Northern States to the inflexible rule prescribed by the proposed amendment, and to give the power to Congress to deal with the

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 491.

Southern States on this subject as might be demanded by the exigencies of party.

Mr. Dixon, of Connecticut, moved to amend the resolution of submission by providing that the ratification should be by conventions called in the several States.

Mr. Davis, of Kentucky, moved an amendment requiring this and all other propositions to amend the Constitution to be submitted to a direct vote of the people of the United States.[1]

Other propositions to amend having reference to the mode of conducting Presidential elections were offered.

Mr. Hendricks, in supporting the proposition of Mr. Dixon to refer the question of ratification to conventions thereafter to be called instead of to the State Legislatures, called attention to the elections, Presidential and Congressional, of the preceding fall, and to the resolution of the Chicago convention hereinbefore quoted, announcing that in the North this was a matter for State action and of State jurisdiction alone. He insisted that this resolution was a pledge made by the Republican party against the amendment, and he called upon the Republican Senators "to stand by the pledge of faith which your party made to the people."

He said that he had heard much about the logic of events and had heard inconsistencies in political action and conduct and faith apologized for on that ground. "But since the 20th of May last (the date of the Republican National Convention) up to the present hour what events have occurred which change this question? The Negroes were free then—as free as now; your understanding of the subject was as ample then as now. . . . You propose to say to the people of Indiana, 'It is not properly your right to control suffrage; it does not belong to you; our Chicago platform was false on that subject. . . .' Men may be untrue to their political faith elsewhere where offices are to be obtained, where political power is to be held, but in the Senate of the United States may I not appeal to the representatives of great States to stand by pledged and plighted faith? . . . I almost understood the argument of the Senator from Massachusetts to be an admission that the people were against it. If the people are against it, what right have you to change the Government? Is it not

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 671.

the Government of the people, made by them and for themselves?" [1]

Mr. Wilson, of Massachusetts, to whom reference was made by Mr. Hendricks, had just addressed the Senate in opposition to Mr. Dixon's amendment. In that speech he had said in reply to Mr. Davis, of Kentucky: "He knows and I know that this whole struggle in this country to give equal rights and equal privileges to all citizens of the United States has been an unpopular one . . . . it has cost the party with which I act a quarter of a million of votes. There is not today a square mile in the United States where the advocacy of the equal rights and privileges of those colored men has not been in the past, and is not now, unpopular." [2]

Mr. Dixon, arguing in favor of his proposition to submit the amendment to conventions, said: "It is certainly important that the people should have an opportunity to express their sentiments on this question. In the State of Connecticut our unfortunate, I may say our rotten, borough system of representation gives the city of New Haven, with fifty thousand inhabitants and nearly ten thousand voters, the same representation in the Legislature which the smallest town in the State has, with only one hundred and fifty voters. That is the mode of representation in the State of Connecticut today. The City of Hartford and the City of New Haven, with nearly twenty thousand voters between them, and paying more than one-fifth of the whole State taxes, . . . if I am not mistaken, have only four representatives in the Legislature." [3]

Mr. Dixon made another speech in favor of his proposition to refer the question to the people, and against the proposed amendment to the Constitution. He urged the Senate to lift this great question out of the mere region of party politics and elevate it into a purer and higher atmosphere.

He insisted that it was something more than merely conferring suffrage on Negroes; that it was crippling the States, depriving them of a necessary power over suffrage essential to their safety. He showed by reference to the proceedings

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 673.
[2] *Ibid.,* p. 672.
[3] *Ibid.,* p. 543.

of the Constitutional Convention called to frame the Constitution in 1787 that it was deemed by that body an essential idea of our institutions that the right to regulate and control suffrage should remain with the State. He referred to the *Federalist* to sustain the same view.

He contended that a submission of the amendment to Legislatures already chosen would be no real submission, as these Legislatures had been elected when no such question was before the people. In fact he argued that the resolution of the Chicago convention had had the effect of withdrawing the question from the people.

On this point he said:

"In the discussions before the people [during the Presidential canvass] in all the Northern States the ground was taken by all the orators of the Republican party, almost without exception, that the question of suffrage was to be left to the States for their separate action. The honorable Senator from Ohio (Mr. Sherman), who had the kindness to send me his able speech; the honorable Senator from Missouri (Mr. Henderson), who did me the same favor, and other Senators, with the exception of the Senator from Massachusetts (Mr. Sumner), every one of their great orators before the people in that exciting canvass, took the ground that this question was to be left to the States for their separate State action, and if any constitutional amendment was to be made, it was to be an amendment to the State Constitutions made by the people of the respective States. . . .

"Therefore, I say that not only from the importance of this question as subverting the character of the Government, but also from the pledged faith of the great Republican party, acting in solemn council, declaring and promulgating its principles, stating to the people what would be its action in case it should receive a renewal of their confidence; in view of all this, I say that this Republican party is bound in solemn honor, at least, to submit this question, in fact, to the people, to give them an opportunity to be heard upon the subject . . .

"I say, then, in solemn honor you are bound, and you cannot, as men of honor and of character, refuse to submit the question to the actual, genuine sense of the people, nor can you hide yourselves safely and honorably behind technicalities, and say that when the question is submitted to the

Legislatures already chosen it is presumed to be submitted to the people." [1]

It would be well to recall the position of the Senate as interpreted by their own vote, and by the speeches of Mr. Sherman and Mr. Howard, in March, 1867, the beginning of that Congress, in reference to new terms of reconstruction. On an attempt of Mr. Sumner to add to these terms, which embraced only the ratification of the Fourteenth Amendment, and the formation of State Constitutions, allowing Negro suffrage, Mr. Sherman and Mr. Howard had denounced the proposition as a breach of faith and honor, and that good faith required that not one "jot or tittle" should be added.

We turn now our attention for a short time to the action of the House.

On December 7, 1868, Mr. Kelley, of Pennsylvania, offered a resolution to amend the Constitution by adding an article that would read as follows:

"No State shall deny to, or exclude from, the exercise of any of the rights and privileges of an elector any citizen of the United States by reason of race or color." [2]

On January 11, 1869, Mr. Boutwell, from the Committee on the Judiciary, reported the resolution back in this form:

"The right of any citizen of the United States to vote shall not be denied or abridged by the United States, or any State, by reason of race, color, or previous condition of slavery of any citizen or class of citizens of the United States."

After this was a section giving power to enforce this by appropriate legislation.

On the same day there was a motion by Mr. Boutwell to recommit the resolution to the Committee on the Judiciary, which was carried, and immediately thereon a motion to reconsider was made, which was left undisposed of.[3]

At the same time Mr. Boutwell reported from the same committee a bill that secured Negro suffrage in elections of Members of Congress and elections of Presidents and in elections of members of State Legislature directly, without

[1] *Congressional Globe,* January 29, 1869, 3d Session, 40th Congress, p. 707.

[2] *Congressional Globe,* 3d Session, 40th Congress, p. 9.

[3] *Ibid.,* pp. 285-6.

any amendment of the Constitution, and the same proceedings were had on that bill as were had on the resolution of amendment, above explained.[1]

On January 23, 1869, Mr. Boutwell called up this bill and made an elaborate speech in favor of its passage. He insisted on its constitutionality. Some extracts have already been made from this speech. One or two others only are needed.

Mr. Boutwell said: "Our object is to secure universal suffrage to all adult male citizens of the country. The power is in our hands, first as a Congress, secondly, as a party responsible for what this Congress does. If we submit a constitutional amendment alone, we in a certain sense admit that the power for which I am now contending is wanting. More than that, there are but twenty-five States to which we at the present time could look for the ratification of this amendment [to the Constitution]. We have then to secure three other States in support of the proposition. We are to enter upon that work with a certain amount of prejudice against and traditionary opposition to Negro suffrage."

Continuing his speech, Mr. Boutwell stated that he had no doubt that nine-tenths of the Republican party were in favor of manhood suffrage, but there were one-tenth against it, and they constituted the great obstacle to perfecting this benign measure. "For one, I am in favor of taking the responsibility of the position we occupy. We are responsible for universal suffrage as one of the crowning measures of an administration of eight years' duration, to be continued for four years by the judgment of the people already pronounced."

And, exhibiting in the strongest manner his contempt for the wishes and interests of the people of the United States as a mass composed of all political parties, he proceeded:

"The great majority of the people,—and in this connection I will say that by 'the people' I mean those who on the 3d of November last supported General Grant for the Presidency,—the great majority of them expect of us the consummation of this plan." He then proceeded to explain that, by the passage of the bill, enough Negroes would be added

[1] *Congressional Globe,* 3d Session, 40th Congress, pp. 285-6.

to the electors in certain States to assist materially in carrying the amendment to the Constitution.[1]

Mr. Knott, of Kentucky, made a very able speech against the proposition.[2]

On January 30, the resolution submitting the amendment was passed,—ayes 150, nays 42.[3]

The resolution went to the Senate and was referred to the Committee on the Judiciary, from which Mr. Stewart, on February 3, reported it amended by substituting for it the proposition theretofore reported from that committee to the Senate, which it will be remembered secured to Negroes the right "to hold office" as well as to vote.[4]

Among the speeches made in opposition to the amendment in the Senate, it is deemed proper to refer to and quote from that of Mr. Vickers, of Maryland, who, it will be seen, revived some unpleasant reminiscences of Senators, and at the same time contributed valuable information to the history of the Negro suffrage question. He quoted from a speech that had been made in the Senate by Mr. Stewart on December 21, as follows:

"The true question is, shall the General Government interfere with the right of suffrage in the States? When this is attempted, we are not only met by the prejudices, whether just or unjust, of a large majority of the white inhabitants of the United States, but by the conscientious opinions of the Chief Executive of the nation, sustained by many of the wisest and best statesmen and jurists of the country, that the Constitution has placed the question of suffrage exclusively within State jurisdiction. I do not propose to argue at length either the prejudices of the former or the constitutional objections of the latter. But we must remember that prejudice is often more powerful than reason, and that it often happens that the prejudice itself is founded in reason. If this is not a white man's Government, one thing is certain, that neither the black man nor the red man has ever reared such a government."

Mr. Vickers quoted further from the same speech:

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 560.
[2] *Ibid.*, p. 561.
[3] *Ibid.*, p. 745.
[4] *Ibid.*, pp. 827-8.

"Now that these sacrifices have been made and the victory won, are we not bound by every obligation which reverence for the dead, regard for the living, and fear of God can inspire, to preserve, not destroy, the Constitution and Union of these States? Thus far there are two plans presented to the country for the reorganization of the South. The one which finds favor in Congress, if we were to judge the sentiment of that body from those who talk most, is to govern eleven States as conquered provinces by an exercise of power unwarranted by the Constitution, which must inevitably derange, if not destroy, that charter of our liberties. This plan trusts all to force, nothing to conciliation; all to revenge, nothing to charity. It treats with equal contempt the good opinion or hatred of seven million American citizens." [1]

He quoted further from the same speech:

"It may not be unjust for a people whose liberties can only be sustained by intelligence and virtue to pause and hesitate before they intrust those liberties in the hands of four million unfortunate persons, just emerged from the most degrading slavery, before they shall have had an opportunity to learn the principles of that Government whose functions they are called upon to administer." [2]

Mr. Vickers quoted from Senator Wade, of Ohio, in a speech delivered in the Senate in March, 1861, in opposition to an amendment of the Constitution then proposed as a settlement of the sectional difficulties, as follows:

"Mr. President, we must come back to the old ark of safety. We must stand upon the old Constitution; and upon the old, time-honored constructions of that instrument as understood by Marshall, by Story, and the great lights of jurisprudence that have investigated and settled almost every question that can possibly arise upon its construction. I observe the very moment you attempt to patch it up, the very moment you attempt to go counter to that, inevitable difficulties break in upon you. I do not want it amended; I see no defect in it; I am sworn to stand by it."

He also quoted from a speech made in the Senate by Mr. Wade in 1860, as follows:

"There is in these United States a race of men who are

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 906.
[2] *Ibid.*

poor, weak, uninfluential, incapable of taking care of themselves. I mean the free Negroes, who are despised by all, repudiated by all; outcasts upon the face of the earth without any fault of theirs that I know of; but they are the victims of a deep-rooted prejudice; and I do not stand here to argue whether that prejudice be right or wrong. I know such to be the fact. It is there immovable. It is perfectly impossible that these two races can inhabit the same place and be prosperous and happy. I see that this species of population is just as abhorrent to the Southern States, and perhaps more so, than to the North; many of those States are now, as I think, passing most unjust laws to drive these men off or to subject them to slavery; they are flocking now into the free States and we have objections to them. Now the proposition is, that this great Government owes it to justice, owes it to those individuals, owes it to itself, and to the free white population of the nation, to provide a means whereby this class of unfortunate men may emigrate to some congenial clime where they may be maintained to the mutual benefit of all, both white and black. This will insure a separation of the races. Let them go into the tropics. There, I understand, are vast tracts of the most fertile and inviting lands in a climate perfectly congenial to that class of men, where the Negro will be predominant; where his nature seems to be improved, and all his faculties, both mental and physical, are fully developed, and where the white man degenerates in the same proportion as the black man prospers. Let them go there; let them be separated; it is easy to do it." [1]

Mr. Vickers in the same speech quoted from a speech made by Mr. Pomeroy, of Kansas, in the Senate in 1865, as follows:

"For one, sir, I am for leaving this question of suffrage to the citizens of the States, and I claim it as their right to admit whoever they choose to the ballot box. I am not loyal enough myself to allow my own rights as a citizen of a State to be trampled upon in that way. I would not be dictated to as a citizen of a sovereign State by Congress or any other power as to what kind of citizens of my State should be allowed to vote. If they choose to let all the citizens, in-

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 906.

cluding the women, vote, it is not a matter for Congress to interfere with. The citizens of a State are not confined to its male citizens, either white or black, and the right of voting does not follow the right of citizenship. The States have their own way about that. Some States let one class of persons vote and some another, and I want that course continued.

"The people of my own State are supposed to be loyal; they are as radical as are the citizens of Massachusetts; but they are not loyal enough to allow Congress to dictate to them what kind of qualifications for voting they shall have." [1]

The sentiments thus expressed at the beginning and at the close of the war by these distinguished Senators, who were in 1868, three years afterward, pressing Negro suffrage on the South, were still respected by the Senate when they were to be applied to a foreign colored population and to the Northern States. Mr. Williams, of Oregon, moved to amend the resolution of amendment to the Constitution by inserting "natural born" before "citizens."

He said if his amendment was adopted, California and Oregon would be enabled to exclude Chinese from voting and holding office; it would not affect Europeans.

"I propose to leave it with the States to discriminate against foreigners on account of race or color, so that it may be enacted by the State of New York that Africans immigrating into the United States shall not hold office in that State; thus discriminating against foreign-born persons of the African race on account of their color." [2]

After some conversational debate between Senators Trumbull and Fessenden, Mr. Williams said: "I am only anxious in all that I say or do in reference to this amendment to enable . . . . Congress or the States on the Pacific Coast, as they are the States directly interested, to prevent the thousands and perhaps millions of Chinese who may flow in upon that coast from taking possession of the political power of that portion of the Republic. That is all I desire to do." [3]

Mr. Morton sympathized with the views of the Senators from the Pacific Coast. In advocating that the

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 906.
[2] *Ibid.,* p. 938. [3] *Ibid.,* p. 939.

amendment should be so framed as not to include Chinese, he said: "They can never mingle with us; they never can be a part of the American people; they will have a civilization that will stand like a wall of iron over them and us, between their children and ours. I believe they will seize and hold power if it shall be placed within their hands, or within their reach, for their own protection; and who can blame them?" [1]

Mr. Corbett, of Oregon, moved to amend by adding:

"But Chinamen not born in the United States, and Indians not taxed, shall not be deemed or made citizens." [2]

Mr. Corbett, in his speech in favor of his amendment, referred to the incapacity of Chinese for self-government, and argued strongly against giving them the right of suffrage.

He owned that he favored Negro suffrage in the Southern States, but he could not see his way clear to impose it on the Northern States by constitutional amendment. He said the Fourteenth Amendment was preferable to the present amendment, and claimed that it was sufficient; and that the present proposition virtually contradicted several portions of the Fourteenth Amendment. He quoted a resolution of the Republican State Convention of Oregon in March, 1868, favoring restoration of the Southern States on the basis of the Fourteenth Amendment. He also quoted the following resolution passed by that body:

"Resolved, that under the Constitution the Federal Government has no right to interfere with the elective franchise in any State having representation in Congress, and where civil government is not overthrown by rebellion." [3]

He then quoted the resolution of the Republican National Convention at Chicago, in May, 1868, that has been before copied, and declared that it was in accord with the above resolution of Oregon. He said he did not feel at liberty to depart from that doctrine and "to disregard the obligations we there pledged to the people of Oregon and the Pacific Coast, and violate that platform." [4]

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1034, February 9, 1869.
[2] *Congressional Globe,* 3d Session, 40th Congress, p. 939.
[3] *Ibid.*
[4] *Ibid.*

Mr. Howard, of Michigan, spoke in favor of the Fifteenth Amendment, and insisted that the resolution of the Republican National Convention did not contravene that position.

Mr. Hendricks criticized the position of Mr. Howard on this subject, insisting that the true meaning of the resolution of the Republican National Convention was a pledge by the Republican party to allow the power of the States over the subject to remain. He also stated that Mr. Howard, in order to get away from the plain language of the party, resorted to criticism on his own platform.

Mr. Sumner: "May I remind the Senator that a conspicuous leader of the party, who is now dead, made haste when that improvident resolution was put before the public to denounce it as foolish and utterly untenable? I refer to Thaddeus Stevens. He said that that position taken at Chicago was foolish and untenable. He wrote a letter within a week after that was published."

Mr. Hendricks: "Was that letter published?"

Mr. Sumner: "It was published and extensively circulated. I never had any hesitation in saying the same thing."

Mr. Hendricks: "Then I understand that Mr. Stevens, to whom the Senator refers, and the Senator from Massachusetts himself, put this construction upon this clause, that it declares the control of suffrage properly as a political question, independently of constitutional provisions, to belong to the States; and if that be the proper construction, then I say to the distinguished Senator from Massachusetts that his party now proposes to do that which it pledged to the people a year ago that it would not do." [1]

Mr. Sumner made no response to this.

Mr. Hendricks, in further discussing the Fifteenth Amendment, claimed that the right of the States to regulate suffrage was of the very essence of the relations between them and the Federal Government, and that it could not safely be taken from them. He further contended that if Congress determined to assume this power, to initiate a change of the Constitution, it ought to be very clear that their doing so was for the public good. "I know there are very many distinguished men in the Republican party who

[1] *Congressional Globe*, 3d Session, 40th Congress, pp. 987-8.

have recently expressed the opinion that universal suffrage would be an evil; that these colored people, just come out of a condition of slavery, were not qualified to exercise the suffrage for the good of the public." [1]

Mr. Hendricks referred to the experiment of the Southern States under the reconstruction laws of Congress, and declared that it did not furnish a very satisfactory test of the capacity of the Negro for self-government; the success of the Government in those States had not been such as to justify very high hopes; that he was not satisfied, as many of the Republicans recently were not satisfied, that it was wise to extend the suffrage to the colored people; if any State chose to do it of her own will, it was her right, and he made no war on that. "But," continued Mr. Hendricks, "I am not satisfied; I never have been satisfied that it is wise to make suffrage universal so as to include that race; and I think upon this subject there are some Senators in this hall who are going to vote for this amendment who agree with me. . . . I do not believe that the Negro race and the white race can mingle in the exercise of political power and bring good results to society. We are of different races. Men may argue about it as much as they please; we know there is in many respects a great difference between the races. There is a difference not only in their physical appearance and conformation, but there is a difference morally and intellectually; and I do not believe that the two races can mingle successfully in the management of Government. I believe that it will bring strife and trouble to the country. That is my conviction upon the subject. I do not believe that they will add to the common intelligence of the country when we make them voters. . . . That race, in its whole history, has furnished no evidence of its capacity to lift itself up. It has never laid the foundation for its own civilization. Any elevation that we find in that race is when we find it coming in contact with the white race. The influence of the white race upon the colored man has carried him up somewhat in the scale of civilization, but, when dependent upon himself, he has never gone upward. I am willing that shall be tested by the history and experience of two thousand years back. While

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 989.

the tendency of the white race is upward, the tendency of the colored race is downward." [1]

Mr. Davis, of Kentucky, argued strongly that the Negro race was unfit for political power.[2]

Mr. Edmunds insisted that Negro suffrage was already secured in all the States by the Fourteenth Amendment to the Constitution, and asked, "Who is able to say where the twenty-eight or twenty-nine independent States are to be found who will agree to any further addition to that instrument?" [3]

Mr. Edmunds, in opposing the Fifteenth Amendment as unnecessary, said: "In all the Southern States where the great body of this disfranchised class or race now are,—I mean disfranchised practically,—they have acquired a right to vote under local constitutions, to say nothing of the fourteenth article; and they will never lose it except through a convulsion as great as any we have lived to witness. History does not record an instance where any class or race, however inferior gentlemen may suppose them to be, however ignorant they may be, have ever given up or lost political privileges they had once obtained, except through the convulsions of revolution and anarchy. These people, therefore, in those ten States will maintain the practical exercise of the right to which they have recently been admitted, and there is no danger whatever, except through the convulsion to which I have referred, and against that you have the constitutional power of the whole nation which you are bound to exercise, that they will go backward [*sic*]. On the contrary, as they assist to mold the institutions their own institutions will assist to elevate them, as they have all other men who entered upon the race of civilized life. They will go forward if you let them alone, instead of going backward." [4]

Mr. Doolittle, in opposition to the Fifteenth Amendment, made a strong speech on the race question. He said: ". . . . among the white men of sense in this country there is not one in ten who, if you will sit down by his side and get into his interior thoughts and conversation, will not tell

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 989.
[2] *Ibid.*, p. 996.
[3] *Ibid.*, p. 1000.
[4] *Ibid.*, p. 1001.

you that, as a general rule, the Africans are incompetent to vote. We know it. Everybody knows it.

"What is the occasion of that incompetency? It is not a matter of a day, nor a year, nor a generation. It is a matter of six thousand years and the whole history of the race. Men speak of the question as a question of skin. I have heard my honorable friend from Massachusetts hour by hour denounce the oligarchy of the skin, as if the skin was not mentioned simply as one of the incidents of the race, to distinguish it from other races; whereas, everybody who knows anything on the subject knows, all natural philosophy teaches, all ethnologists, all historians, all men who know by actual experience anything of this race know that the skin is by no means the greatest distinction between the African and the white man." He alluded to other differences. He further said:

"We often quote here the language of Jefferson declaring for equality of the rights of men. . . . But Jefferson also declares, with as much distinctness and with as much force as he declares the natural rights of men, that it is impossible for you to put these two races together and maintain them upon a footing of equality side by side in the same Government. Your experience has demonstrated it. In the States in the South, you, sir [Mr. Welch, in the chair], know, and there is not a man in the Senate who does not know, that the irrepressible conflict of race,—not a conflict of arms, for the power of the Federal Government prevents that, but a conflict of race, irrepressible, constant, eternal,—is going on between the blacks and the whites, as it is going on between the whites and the Indians on the frontier. They may blind their eyes if they please to these facts, but they are as bright as the sunlight everywhere. Just so long as the effort is made to enforce an unnatural equality between the white race and an alien and inferior race, an exotic race which does not belong in the temperate zones of the earth, which has been brought here from the tropics where God planted it and intended it to stay, and from which the cupidity of man has wrenched him . . . . and forced him into this exotic condition on the soil of the United States, so long will this warfare go on, etc." [1]

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1010.

He favored colonization in the West Indies.

Mr. Warner proposed to amend by giving suffrage and the right to hold office directly to all males twenty-one years old and upward in all cases, except those who may hereafter engage in rebellion against the United States or shall be convicted of treason, felony, or other infamous crime.

Mr. Sherman seemed to have no special interest in passing the amendment at all. He said:

"I thought nothing would tempt me to say one word in this debate on the constitutional amendment, but Senators have already perceived the difficulty we are approaching, and we might as well at once face the issue." He stated the five different causes of exclusion from suffrage in this and other countries.

First. Race, which has existed in nearly all the States until recently.

Second. Property, which has existed in England always.

Third. Religion, which exists in nearly all countries except this.

Fourth. Nativity, which exists in nearly all countries.

Fifth. Education, and that is an experiment of ours, as he believed, in Massachusetts.

He proceeded:

"Now, Mr. President, if we are endeavoring to settle this question once for all, I think it would be wiser and better to declare that every male citizen of the United States, native or naturalized, above the age of twenty-one years, shall have the right to vote, unless he is excluded for crime; and that no State shall exclude any one from the right to vote because of his race, because of his property or want of property, because of his religion, because of his birthplace, or because of the misfortune of want of education. As this amendment [of Warner] makes the nearest approach to that, I have made up my mind to vote for it, or I shall vote for the amendment of the Senator from Massachusetts [Mr. Wilson]. I do not like to apply a rule so narrow and limited as to guaranty rights to the African race which we refuse to the Asiatic race or to other races. I do not wish to include the ignorant masses of our Southern population and exclude the partially intelligent classes of the State of Massachusetts. I do not want to include the Negroes and

exclude, or allow a State to exclude, foreigners who are declared to be citizens of the United States under the laws of the United States.

"Therefore, it does seem to me that if we intend to now prescribe a rule for suffrage in this country, we ought to make it operate universally and withdraw from the States all power to exclude any portion of the male citizens of the United States . . . . above twenty-one years of age of the right to vote, unless when the right has been forfeited by crime." [1]

Mr. Sherman, further discussing this subject, said:

"The amendment [the Fifteenth] changes the Constitutions of thirty States of the Union. Among others it changes the Constitution of the State of Ohio. This is a very sensitive question with our people. The great body of the party to which I belong have long been in favor of dispensing with and repealing all discriminations on account of color, but we made an appeal to the people two years ago on this subject and were defeated; and I may say that no change can be made in the Constitution likely to excite so much popular feeling as this proposed change to extend to the Negro race in the State of Ohio the elective franchise. I say this freely, because I am in favor of giving to them every right which is conferred by the Constitution and laws on white people. . . .

"Why should we protect the descendant of the African, when in certain States of the Union a man who has the misfortune not to be able to read and write cannot vote? Why should we apply this supreme remedy of the Constitution only in favor of this particular class of our citizens?" [2]

Mr. Sherman, continuing and arguing in support of the proposition that the amendment to the Constitution should be framed so as to secure suffrage in all the States to all male adults except those convicted of crime, said:

"But, sir, if I go before the people of Ohio with a constitutional amendment such as that which is sent to us by the House of Representatives, or that which is proposed by the Judiciary Committee, how shall I be met? Take the prejudice and feeling of that people known to me, and known

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1013.
[2] *Ibid.,* p. 1039.

to all Senators, and when I go before them how shall I be met? I shall be told: 'Here are . . . . people excluded from office in New Hampshire because they are not Protestants. Why do you not correct these evils at your own door, evils brought upon the country by your own friends, and why should you protect only and seek to extend only the right of suffrage to the colored race, who are just emancipated from bondage, who are ignorant, who are without the capacity, probably, for self-government? . . .' How can you answer it? It is impossible to answer, especially when you meet a prejudiced people who have got to vote on this question. The people of Ohio come from all the old States, many of them from Virginia and Maryland and other of the old slave States. They are full of prejudices. Unless you show that you are willing to adopt a universal rule which tramples down their prejudices, and the prejudices of the people of other portions of the old States where they have not adopted, probably, the more advanced rules on this subject,—unless you can show that you have dealt with this question in an enlightened spirit of statesmanship, you will be borne down by popular clamor. It will be said this is a mere party expedient to accomplish party ends, and not a great fundamental proposition upon which you shall base your superstructure." [1]

The extracts above quoted were part of a speech made in advocacy of a substitute to the amendment as reported by the Judiciary Committee offered by Mr. Wilson, of Massachusetts, in the following words:

"No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise, or in the right to hold office in any State on account of race, color, nativity, property, education, or religious creed."

This substitute was adopted by a vote of 31 to 27.[2]

The above is the shape in which the amendment passed the Senate, except that it embraced also a provision in relation to elections of President, to be hereinafter set out, yeas 39, nays 16. Among the nays were Senators Anthony and Sprague, of Rhode Island, and Mr. Edmunds. Among the

[1] *Congressional Globe* (Feb'y 9, 1869), 3d Session, 40th Congress, p. 1039.

[2] *Ibid.*, p. 1040.

absentees were Senators Fessenden, Frelinghuysen, Patterson, of New Hampshire, Pomeroy, and Trumbull.[1]

Before its passage several amendments to the resolution of submission were offered and voted down. Among them was a proposition of Mr. Buckalew that the amendment should be submitted to the Legislatures of the States, the most numerous branch of which should be elected after the submission. On this the yeas were 13, and nays 43.[2]

Another was a proposition of Mr. Dixon that the amendment should be submitted to conventions to be called in each State; on this the yeas were 11, nays 45.[3]

Morton offered an amendment requiring electors for President and Vice-president to be elected by the electors in each State qualified to vote for representatives in Congress. This amendment was at first voted down by yeas 27, nays 29.[4] It was afterward on the same day carried by a vote of thirty-seven to nineteen, and it was provided that this proposition should be submitted for ratification separately.[5]

Mr. Sumner moved as a substitute for the amendment, so far as it related to suffrage and holding office, a statute directly affirming the right of all to vote and be voted for, without discrimination as to race or color, and punishing all who should obstruct or deny this right. On this the yeas were 9,—Messrs. Edmunds, McDonald, Nye, Ross, Sumner, Thayer, Wade, Wilson, and Yates.[6]

It is proper to note here the difference between the two houses as to the framework of the Fifteenth Amendment. The House proposed simply to secure the right of suffrage against abridgment or denial by any State, or by the United States, on account of race, color, or previous condition of slavery. As amended by the Senate, it was a prohibition against discrimination in any State as to the right to vote and to hold office on account of race, color, nativity, property, education, or religious creed. The Senate also amended it by adding as a separate article to be submitted separately Mr.

[1] *Congressional Globe*, 3d Session, 40th Congress (Feb'y 10, 1869), p. 1044.
[2] *Ibid.*, p. 1040.
[3] *Ibid.*
[4] *Ibid.*, p. 1041.
[5] *Ibid.*, p. 1042.
[6] *Ibid.*, p. 1041.

Morton's amendment securing the election of electors for President and Vice-president by popular vote.

In this shape the Fifteenth Amendment went to the House for action on the changes made by the Senate.

The amendment came before the House of Representatives on February 15.

Mr. Woodward, of Pennsylvania, asked leave to offer an amendment submitting the proposed amendment to the Constitution to Legislatures of the States thereafter to be elected. He said, in support of this, that he wanted to give the people of this country an opportunity to pass upon the question; that a submission to the present Legislatures was not submitting it to the people, and gave them no opportunity of passing on it. He was not, however, permitted an opportunity to offer his amendment.

On the motion to concur in the amendment so far as it related to suffrage, the ayes were 37, nays 133.[1]

The Morton amendment in relation to the election of President and Vice-president was concurred in.

The House refusing to concur in the Senate amendments, a conference was asked. When this went back to the Senate that body, after first settling that a vote to recede from its amendments did not pass the original House resolution, voted so to recede by yeas 33, nays 24.[2]

Afterward a motion was made to lay the House resolutions of amendment on the table, ayes 28, nays 39.[3]

On the motion to concur in the House resolution the ayes were 31, nays 27.[4] Two-thirds not voting for it, the motion was lost.

The Senate then proceeded to consider Senate Joint resolution No. 8, which had been laid aside on the adoption of the House resolution of amendment.

Some verbal amendments were made to the proposition of amendment on this resolution, so as to make it read as follows: "The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or by any State on account of race, color, or previous

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1226.
[2] *Ibid.,* 1295.
[3] *Ibid.,* 1297.
[4] *Ibid.,* p. 1300.

condition of servitude," with a second section giving power to Congress to enforce it.[1]

A good deal of debate ensued on the final passage of the resolutions. Several amendments were proposed and voted down, and among them a proposition to submit the amendment to Legislatures to be thereafter elected. Finally, on the same day, the resolution of amendment passed, yeas 35, nays 11. On the passage, Messrs. Sherman, Anthony, and Trumbull, and others did not vote.

As it passed the Senate the amendment was as it stands now, except that it then contained the words "and to hold office," securing that as well as the right of suffrage.[2]

Whilst the amendment was pending in the Senate, in support of a proposition to submit the amendment to conventions or Legislatures elected after submission, Mr. Hendricks, among other things, said:

"I know how it is; it is now just as it was a year ago; you are not willing that the question shall go to the people; you know that they will vote you down; you know that they don't want it; you know that the large body of the people do not want it; and you want to force it under circumstances that their voice, which in America ought to be potential, shall not be heard upon it. That is the plain fact about this matter. You do not intend them to be heard. You do not care for their will. You care for your own purposes. What are they? They have been intimated; they are well understood,—to throw a political power in favor of your party that you do not now possess, to secure a vote that the people will not give to you. Therefore you want Legislatures already selected to act upon this proposition, when you told the people at the time they were selecting these very Legislatures that the question of suffrage should remain with the people of the States." [3]

Mr. Morton said: "I am willing to submit it to the experience and observation of every Senator here to-night of any party whether a single Democratic speech was made in any State during the late canvass that was not devoted principally to the subject of the Negro,—Negro equality, amalgamation, social equality,—if the people were not warned that their

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 1301.
[2] *Ibid.*, p. 1425.
[3] *Ibid.*, p. 1314.

daughters were about to be married to Negroes, and if the Democratic party did not throughout the late canvass at every meeting and in every speech, in season and out of season, keep the whole question of Negro equality politically, socially, and in every other way, constantly before the people? And yet they now complain that the subject has not been discussed before the people." [1]

Mr. Hendricks: "I wish to say, in reply to my colleague, that whatever statements the Democrats made on this subject were very emphatically and earnestly denied by his party, so that the people, to say the least of it, would become confused in a discussion of that sort."

Mr. Conkling: "The Senator will allow me to suggest in aid of his proposition that the people had become so accustomed to disbelieving what the Democrats did say that it did not make much impression." [Laughter.]

Mr. Hendricks: ". . . . I do not believe the people have any more confidence in politicians and party platforms and assurances than perhaps they ought to have. I do not care about discussing that matter. But my colleague will not claim that in the State of Indiana the proposition to confer suffrage upon the Negro was made by his party last year. I recollect when the Civil Rights bill was a matter of discussion before the people elaborate arguments were made in that State by gentlemen who now occupy very high positions indeed to prove that the Negro would not be made a voter according to that policy. . . ." [2]

Mr. Morton did not deny this.

On the proposition to submit to new Legislatures the yeas were 10 and nays 39. Among those not voting were Anthony, Sherman, and Trumbull.

Mr. Conkling, in order to quiet the scruples of some who were opposed to the amendment, argued that he did "not understand that a representative in the other House, or a member of this body, commits himself absolutely and in all senses to the wisdom and propriety of a proposed constitutional amendment by voting to submit it to the States of the Union." [3] He argued that a proposition of amendment might

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1315.
[2] *Ibid.*
[3] *Ibid.,* p. 1316.

well be submitted by Congress, when a large part of the two-thirds necessary to submit it would not themselves advise its ratification, or act in favor of its ratification ultimately.

The proposed constitutional amendment went to the House on February 20. Mr. Boutwell took the floor. He would not yield it to allow Mr. Woodward to move an amendment to the resolution submitting the Fifteenth Amendment to Legislatures chosen after the submission. He also declined to yield to allow amendments to be offered by Mr. Bingham and Mr. Shellabarger. He yielded, however, to Mr. Logan (General Logan) to move to strike out "and to hold office."

Mr. Logan, in support of his amendment, argued that "the intention of the Constitution of the United States was to leave to the States to determine what persons should hold office. I believe it has been properly left there by the Constitution, and that it should be allowed to remain there. That it is necessary to put in the words 'and to hold office' to give the colored people the right to vote is all imagination. There is no law for it whatever. . . . What we should do, in my judgment, is to give all men, without regard to race or color, the right of suffrage, and when we give them the right to vote, they will take care of the right to hold office." [1]

Mr. Butler, though favoring the idea that the right to hold office would follow the right to vote, yet was induced to vote against the amendment of Mr. Logan. He said: "It is apparent to me that if we do not pass this now as we receive it from the Senate it will be too late forever to pass it." [2]

On Mr. Logan's motion to strike out the words "and to hold office" the yeas were 70 and the nays were 95.

Among the yeas were Bingham, Garfield, Schenck, and Logan.

Mr. Bingham's motion to strike out "United States" and insert after "color" the words "nativity, property, or creed" was sustained by yeas 92, nays 70.[3]

This amendment made the proposed amendment read as follows:

"The right of citizens of the United States to vote and hold office shall not be denied or abridged by any State on ac-

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 1426.
[2] *Ibid.*
[3] *Ibid.*, p. 1428.

count of race, color, nativity, property, creed, or previous condition of servitude."

The restriction was thus taken off the United States and left on the States alone.

The question was then taken on the passage of the resolution of amendment,—yeas 140, nays 37, absent 46.[1]

The resolution as thus amended was taken up in the Senate on February 22. After some little debate it was postponed until the 23d, and then the motion to disagree to the House amendment and to ask for a conference was sustained.

Messrs. Stewart, Conkling, and Edmunds were appointed conferees.[2]

The House conferees were Messrs. Boutwell, Bingham, and Logan.

On the 25th of February the conference report was made. It was not signed by Mr. Edmunds.[3]

The report recommended that the House recede from all their amendments, and that the words "and to hold office" be stricken out of the amendment.

It will be noticed that both Houses had agreed that these words "and to hold office" should be retained. They were in the Senate resolution when it was passed, and the House refused to strike them out, as before stated.

Objections were made by Republican Senators that the Conference Committee had exceeded its jurisdiction in recommending that the words "and to hold office" should be stricken out, though they had been agreed to by both Houses, and did not, therefore, constitute a part of the disagreeing vote of the two Houses, about which the conference had been appointed. This view was supported by Mr. Pomeroy and Mr. Edmunds. Mr. Pomeroy produced all the precedents, the effect of which was stated by Mr. Edmunds to be as follows:

"My friend from Kansas has shown from the Journals of this body that there never has been an instance, so far as he has gone, in which a committee of conference has attempted to go outside of the subjects of disagreement, and to change that which had already been agreed to, except where both Houses, dispensing by unanimous consent with all rules of

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1428.
[2] *Ibid.,* p. 1481.
[3] *Ibid.,* p. 1593.

order, have agreed unanimously to make some phraseological change." [1]

Note that the change outside of the disagreement had theretofore been only in phraseology, and that only by unanimous consent of both Houses.

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1593.

CHAPTER XI

THE FIFTEENTH AMENDMENT

This was now the 26th of February. The sands of the Fortieth Congress were fast running out. When it ended, it would be too late forever to pass the amendment, as suggested by General Butler. The next Congress, as suggested by Mr. Frelinghuysen, and sustained by Mr. Stewart, might not be favorable to it. Twenty-five Legislatures had been secured in the elections of the preceding fall, which could be relied upon "to spit upon the platform" on which they had been elected and to ratify the amendment without consulting their constituents or allowing the people to express their wishes in the matter. The Houses had disagreed. A conference had been appointed that not only settled the disagreement, but undertook, in obedience to a sentiment represented by General Logan, to undo the work that both houses had assented to. The right of the Negro to hold office was not acceptable to the Northern people. His right in that respect in the Southern States, it was thought, was secured by the grant of the elective franchise; and by the largeness of the members of this class in the South it was thought that his right to hold office there was also secured.

The last fight on this constitutional amendment was made on the right of the Negro to hold office.

Mr. Edmunds,—who, it will be recollected, refused to sign the conference report and afterward proved that the committee had exceeded its just powers,—after referring to the ostracism of blacks by the States, and avowing that the very object of the amendment was to correct this and secure a true democracy, said:

"And what are the steps on this report you propose to take to do it? You propose to take the very steps . . . . you propose to take the very steps that all history has demonstrated to be deadly to a republic.

"To be sure, the instances are not frequent, for few people have been so wanting in intelligence and in a knowledge of the philosophy of a Republican government as ever to institute a distinction between the right of a citizen to participate, if he is to participate in the government at all, entirely (*sic*); and if you give him the right to have a voice in the government, that voice cannot have any live expression, unless it enables him to choose from among his fellow-citizens the man who suits him for his representative, instead of confining him, as this amendment does, to a chosen aristocratic class, saying to a citizen of a free Republic, 'You have rights of manhood, you have rights of equality, but you shall exercise those rights in choosing some one of us to rule over you, instead of some one of your fellow-citizens whom you prefer.' " [1]

Mr. Edmunds further said:

"There is no instance within my knowledge of history for the last five hundred years in any country . . . . where there has been attempted the method that is proposed in this amendment, of excluding the mass of the community from exercising the powers of government in the way of being voted for and representing their fellow-citizens, instead of merely having the boon that the plebeians of Rome had, to vote for the aristocratic magistrate selected from among the patricians. Now, sir, do we wish to set up a patrician class in these Southern States? Do we wish to try an experiment that has overthrown the most civilized of ancient governments? It would seem that we did by this amendment. . . . Why, sir, we have an illustration before our eyes that has been pressing itself upon our attention for months on this very subject. You have in this nation at this day, in one of the very States upon which this Constitution is to operate, an illustration of the result you will come to by adopting an amendment of this kind, an amendment which, containing half of an inseparable, indivisible, and united truth, is in reality a falsehood; and that State is Georgia. You will find, if you let the thing run on, that the example of Georgia will be imitated in all the other States, and you will have set up in this Republic a class aristocracy depending not upon intelligence, upon which some philosophers say a distinction may be made, . . . but dependent upon the mere accident of the complexion of a human

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 1626.

being, who you say, so far as you go, is entitled to equal rights and privileges as a citizen of the country. . . .

"Are you not giving to the people the mere husk and shell of the feast of political equality to which you invited them, reserving the substance and juices for yourself? . . .

"And where is the necessity for taking this half step, as some gentlemen argue it, of getting all you can, if you cannot get the rest? Is it to be found, so far as we have yet heard, in any argument of the intrinsic propriety of the thing? Not at all. No Senator has raised his voice to defend the right of any State to say while you give a man the right to vote you shall not permit him to be voted for. I do not know but that we shall hear it yet, though nobody has heard it so far. What is the reason, then? Some vague fear, I suppose, fills the mind of some trembling convert to liberty that his people will not be satisfied to give the Negro the right to run against themselves for some office, but they are willing to confer upon him the boon of voting for them. I do not believe in that, sir. As I have said, I believe it to be ruinous to the Government if it is carried out. I believe it to be an outrage upon the good sense and patriotism of the country; and so believing,—though I do not wish to occupy time in stopping its progress if my political friends think it best to pass it,—I have felt bound to say so." [1]

Mr. Wilson, of Massachusetts, stated that for thirty-three years he had opposed slavery on all occasions by word and deed; he had asked always for what was right, but had always taken what he could get, believing that the next step would be more easily taken after one had been already taken in the right direction. "I suppose, sir, I must act upon that idea now; and I do so with more sincere regret than ever, and with some degree of mortification. In the early part of this session, before the month of December passed away, I had hoped that the majority in Congress would seize the great occasion which was presented, when the hearts, minds, and souls of the people, after having passed through a great struggle, were deeply imbued with the love of liberty and the sense of justice, and we had twenty-five Legislatures in the hands of our friends, and take the responsibility of submitting to the Legislatures a proposition to amend the Constitution so as to secure

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1626.

to the colored citizens of this country the right to vote and be voted for. But day after day, week after week, month after month, passed away without action." [1]

Mr. Wilson then referred to the proposition giving colored men the right to vote and not to hold office, and called it a lame and halting one. He alluded also to the amendment as it passed the Senate, securing the right to vote and hold office irrespective of nativity, property, education, and creed, and he deplored its defeat. He referred to the action of Georgia where the Constitution secured only suffrage to black men, and afterward they were turned out of the Legislature. He said: "The black men in their magnanimity and generosity . . . . allowed unrepentant and unforgiven traitors to sit in the Legislature with them, and the moment those men got the power they hurled the black men out of the Legislature. There are no Senators sitting here from Georgia on account of that action, and we have passed months and we do not yet see the remedy." [2]

"Do not tell me, sir," said Mr. Wilson, "that the right to vote carries with it the right to hold office. It does no such thing." He referred to a declaration made by Mr. Webster in the constitutional convention of Massachusetts in 1820, to the effect that no man had a right to hold office, but that the people had a right to define and make the terms and conditions upon which offices should be held. He (Mr. Wilson) said he did not believe in anybody's right to make terms and conditions founded on color or race, that could not be overcome, but many of the States had done it, and silence would not overthrow what they had done. He expressed the hope that the Negroes would soon acquire the right to hold office, and he said that he would work to that end.[3]

Mr. Morton, of Indiana, said that he would probably vote for the conference report because he thought he could not do any better. He went on the principle of taking a half loaf when he could not get a whole one. He expressed his dissatisfaction at the striking out of "property" and "creed" by the Committee of Conference; and, speaking in reference to "creed," he said:

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 1626.
[2] *Ibid.*, p. 1627.
[3] *Ibid.*

"What was the objection to putting that in? We had agreed to it, the House had agreed to it, and yet the committee report to us a proposition rejecting it. Sir, as a question of public sentiment and favor, the proposition as it came back to us substantially from the House the last time would be far stronger before the people than the simple one of confining it to color or race, and then we are liable to this charge, which will now be made, and the force of it we can hardly avoid; it will be said that we are willing that the Negroes shall vote, provided they vote for white men, but the offices must be reserved for white men. We can say of course that we do not mean that; but they will come back on us and say, 'When the proposition was made in the Senate, and after it had been concurred in by both Houses, that the words "to hold office" should be put in, why did you strike them out?' What answer can we make?" [1]

Mr. Morton made no attempt to answer the question.

Mr. Sawyer, of South Carolina, said rather than vote against the amendment, he would vote to concur in the conference report. "We have," he continued, "for two years been subject to the charge in those States [the Southern] that the Republican party of the Northern States put the Negro on one platform in the loyal States and on another platform in the lately disloyal States. We have been constantly called upon to repel this charge. . . .

"Now, Mr. President, we are asked to accept an amendment to the Constitution which pleads guilty to the charge; we are asked to go back to our people and say to them that the national Republican party as represented in Congress acknowledges that the charges which have been made by the late unrepentant rebels against that party are true." He believed that some of the lately reconstructed State Legislatures, strongly Republican as they are, will hesitate before they adopt the amendment, and that "there is quite as much risk of its being lost in a number of those States, as there is in its being lost in an equal number of Northern States if you put into the proposition the right to hold office." [2]

In this extract is disclosed a reason, if not a principal reason, that actuated Republican Senators and Representa-

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 1628.
[2] *Ibid.*, pp. 1628-9.

tives in excluding from the Fifteenth Amendment the guaranty of the right of Negroes to hold office. In nearly all the Northern States at that time Negroes were excluded from office, as well as from voting. The Fifteenth Amendment was precipitated upon the country immediately on the success of General Grant upon a platform that solemnly pledged the party against it. Twenty-five Republican Legislatures had been obtained at the same election and on the same platform. It was believed that Negro suffrage as a punishment to the South, and as a means of controlling the election there at the will of the Republican party, might be tolerated by enough Northern States, which, in connection with the reconstructed Southern States, would constitute the three-fourths necessary for ratification. In the Northern States but few Negroes would be voters, not enough to influence materially their interests. They would vote for the Republican party from gratitude. This was assumed, and rightly assumed. The addition of these few voters to the electoral bases in those States would, therefore, have no other effect than to add to the strength of the Republican party and make it more difficult to dislodge it. It was supposed that for suffrage alone the amendment could be carried on party grounds before Legislatures already elected. But when it was proposed to go a step further and confer on them the right to hold office, whereby there was to be a possibility of having Negro magistrates, legislators, and governors in the Northern States, it was feared that even these pliant Legislatures, already elected, could not be relied on. They were very willing,—as Mr. Morton said the charge would be, a charge that he could not answer,—to have the Negroes vote for white men for whom the offices were reserved, but it was feared they would not go further.

This fear was so strong that even the implied threat of Mr. Sawyer, that the Southern Negro legislatures would not stand it, was of no avail.

No Republican Senator, I believe, attacked Negro office-holding in the abstract. Nearly all who spoke expressed themselves in favor of it.

Mr. Logan, to whose services in the House and on the Committee of Conference is largely due the striking out of the words "to hold office," did not express opposition to the

Negroes holding office *per se,* but, as we have seen, claimed it as a necessary right to each State to determine that matter for itself. He contented himself with the chance the Negroes would have in States in which they were strong enough to secure office by virtue of their right to vote. It seems nobody was satisfied with the amendment as it was passed. Some wanted one thing and some another. Yet the Congress was expiring, and there was a fear that the next Congress would not propose it.

These views are well expressed as follows:

Mr. Stewart, of Nevada, said: "There are no two Senators who agree exactly as to the thing which should be done. The Senator from Kansas has been pressing his motion for female suffrage; the Senator from Vermont wants to have office-holding included; the Senator from Massachusetts wants 'nativity' and 'creed' inserted. . . .

"I wanted to insert the right 'to hold office' in this proposition, but if I cannot give the poor and the downtrodden the right to hold office, I will give them [the right to vote] the power to say who shall hold office and dispense office."

He urged strongly immediate action on the amendment as it stood, giving the Negroes suffrage. He said: "If we fail now, it never will be brought about. The States by individual action will not do it in his [Senator Sawyer's] day or mine. . . . Every Senator must see that there is not time for further action."

Mr. Frelinghuysen, interrupting him: "And no chance at the next session."

Mr. Stewart: "And no chance at the next session. Your Legislatures are waiting now, ready to act. Send it to another conference and the whole thing is lost."

Mr. Frelinghuysen: "There will be no chance at the next session because there will not be a two-thirds vote for it."

Mr. Stewart: "And there must be two-thirds in the other House." [1]

Mr. Davis, of Kentucky, commenting on the above, said: "That presents the party in such a strait as it must upon compulsion do the work now. If the Legislatures hereafter to be elected are against, or will be against, the proposed amendment, as these two able leaders [Stewart and Freling-

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1629.

huysen] of the party in the Senate concede, what would become of the party if it did not pass the Fifteenth Amendment immediately and have all the political benefit which it is capable of giving? What would become of the party, too, if the amendment should now fall to the ground . . . . and after the 4th of March it shall be found that the Republicans have not a majority of two-thirds of the House to pass it?

"But the case would not be desperate, as the honorable Senator stated. The party in the House would only have to resort to its ordinary tactics, and the tactics that have been practised in this body also. They would only have to expel a lot of the Democratic members from the two Houses to give them the requisite majority of two-thirds, and they would be in full possession again." [1]

Mr. Hendricks and other Democratic Senators resisted the amendment with great ability.

He proceeded to comment on the reason given by Mr. Frelinghuysen for action now, that is, that there would not be two-thirds majority for it in the next House, when Mr. Frelinghuysen interrupted by saying that he understood now upon inquiry that the Republicans would have two-thirds majority in the next House.

Mr. Hendricks then said: "He [Mr. Frelinghuysen] furnished to the Senator from Nevada the argument that on the 4th of March a new Congress would come in, and the judgment of the House of Representatives would then be against this measure. That House was elected last fall, and the judgment of the country has been expressed in that election to some extent—to a very little extent in my judgment—upon this question; but it is supposed to be in our theory of government the last expression of the will of the people upon the subject." [2]

The argument was that, the next Congress being against the measure, the friends of it would propose to prevent the action of the popular will and take advantage of the people when the accident of a two-thirds majority in both branches would give them the power to do it.

He further said: "The debate to-day showed that two-

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 1630.
[2] *Ibid.*, p. 1631.

thirds of the Senators are not in favor of this proposition. . . .[1]

"So far as I am concerned I repudiate the whole doctrine that we can take a half loaf, which expresses the idea that in the matter of an amendment to the Constitution it is proper to compromise, to adjust, to trade, if I may so express it. It is not right. When an amendment to the Constitution is made, that amendment ought to command in all of its provisions the judgments of two-thirds of this body and two-thirds of the House. Everybody sees from this debate—it is not covered up—we all know that two-thirds of this body do not agree to this." [2]

Replying to Mr. Wilson's argument that the Republicans should act now because they have twenty-five Legislatures, Mr. Hendricks said:

"The whole of this argument rests upon this—that by a statement in the platform of last year the right to control suffrage in the States of the North properly belonged to the people of those States. Upon that platform a political majority was obtained in twenty-five States. Those twenty-five States, as I understand from the Senator from Massachusetts, stand now ready to ratify this constitutional amendment; and what proposition is that? That the people are against it, but the Legislatures and Congress are for it. We will not let it go to the people either through conventions or Legislatures hereafter to be elected; but it must be hastily dispatched here, sent down to the States, that Legislatures chosen upon an opposite platform may fasten it upon the people. Then, as suggested to me by the Senator from Kentucky, it becomes a difficult matter for the people, a majority of whom to-day are against this measure, to undo that which is thus accomplished." [3]

He insisted that this was an entire abandonment of the doctrine that the Government should be fashioned according to the will and pleasure of the people. "But," said he, "now the doctrine is that we have a right to take the people at a disadvantage; that because you professed to them last year that it was their right in their States to regulate this question, and

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1632.
[2] *Ibid.*
[3] *Ibid.*

thereby obtained from them a majority of the Legislatures, it is your right hastily to pass this business through Congress and send it down to the States and fasten it upon the people before their voice can be heard upon it. That is the precise attitude of the question in the Senate at this hour, and that is the precise argument upon which it is claimed that this report of the committee must be carried through; not that it is right; not that the Presiding Officer of this body believes it is as it should be; not that my colleague [Morton] believes it is as it should be; not even that the chairman [Stewart] of the Committee of Conference believes it is as it should be; but it is in such a shape as you can pass it; you can take half a loaf from the people; you can force it through the State Legislatures and accomplish a political result, not having the judgment and approval of two-thirds here and not having the approval of the people of the country." [1]

Replying to a statement of Mr. Drake that the result of the election in Indiana in the preceding fall indicated that Mr. Hendricks did not represent the sentiment of that State on this amendment, Mr. Hendricks said:

"His [Drake's] party said to the people of Indiana that when Mr. Hendricks, or any other Democrat in the State, told them that it was the purpose of their [the Republican] party to carry out Negro equality, it was a slander; that it was not their doctrine; and, Mr. President, you told them that in a document of the greatest dignity your party could produce,—the national platform. In that you said to the people of Indiana, 'The right properly belongs to you to say who shall vote and hold office in that State.' Upon that platform you went before the people of Indiana and satisfied a great many of them that they ought not to credit the suspicions expressed by Democrats of your integrity in that declaration. I did not believe very much in it. I believe I understood what was the ultimate purpose; but the plain and unsophisticated people of the country, that had perhaps not seen quite so much of political movements and machinery, did believe you, and they thought that in fact you intended to leave to the people of the States the regulation of suffrage and the right of holding office. You said to the people one thing, and then after you have got the majority of Congress and the Legislature

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1633.

you propose to do another thing. That would be defined not as the highest act of honesty in ordinary commercial transactions." [1]

In the debates it is thus seen that Republican Senators met the charge that passing the amendment was a violation of the platform of their party,—the solemn promise made to leave the question of suffrage to the action of the States,—by the statement that the Democrats had charged that this promise was a sham and intended to deceive the people, and that the Republican leaders would disregard it if they succeeded in the election. This would be impossible in ordinary times. But men's passions were then excited. The lust for power was then stronger than ever before. The Southern people were not represented in Congress. They were hated for their action in the war. Punishment by legal tribunals was then impossible. The Fourteenth Amendment had, contrary to the wishes of its authors, operated as an amnesty, and the President could exercise the pardoning power to any extent. It had been determined, as we have seen, that punishment might be rightly inflicted by establishing governments that would of themselves ruin the Southern States, as expressed by Mr. Garfield. Governments and political institutions that have their rightful existence in the hypothesis that they contribute to the happiness and welfare of the governed in this new gospel were deemed to be the rightful instruments of inflicting ruin. To such a degree had this perversion of judgment been carried that to compass the end of ruin to the vanquished it was deemed not infamous to disregard the most solemn pledges that had been made to the people in securing their suffrages; and it was deemed proper to justify this breach of faith by the avowal that their political opponents had attributed to them this intention to deceive.

But there were developed difficulties in coming to an agreement as to what the Fifteenth Amendment should contain. We have noticed Mr. Stewart's declaration on that subject,—that no two senators agreed as to this. Mr. Morton, Mr. Sherman, and others wanted many other disqualifications removed than the mere disqualification of race. In at least two of the New England States there was a disqualification of the illiterate. In another, Rhode Island, there was a discrimina-

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 1633.

tion between native born and naturalized citizens. Men who had concurred in imposing on the South universal Negro suffrage, with prohibition on the Southern States to require any degree of intelligence, or the possession of any amount of property as a qualification for suffrage, were unwilling to impose this yoke on themselves. They were willing to ordain that there should be no discrimination as to race because there were but few Negroes within their borders. They were unwilling to prohibit a discrimination based on intelligence and nativity, because there were many naturalized citizens in their borders and many natives who were incompetent from want of proper intelligence.

Mr. Anthony, of Rhode Island, was so opposed to these provisions that added other subjects for non-discrimination than race that he was opposed, or seemed to be opposed, to the whole movement. He said that he apprehended "that there is no possible danger of their [the Negroes] losing the rights which have thus [by the reconstruction laws and the new Constitutions of the reconstructed States] been conferred on them. The ballot has been given to them and cannot be taken from them without their own consent. To doubt their ability to keep it is to doubt the wisdom of conferring it upon them." [1]

He thus expressed his repugnance to taking any action at all on the subject. He did not recognize at all the latter-day claim that the Fifteenth Amendment was one of the results of the war that was demanded to secure the fruits of victory.

Proceeding, he professed a reluctance to the making of changes in the Constitution, declaring that an amendment to it was the greatest of all matters devolving on Congress and on the States. He seemed to be impressed unfavorably with the whole movement, especially with the haste that characterized the proceedings. He even seemed to have some feeling for the rights of the Southern people. On these points he declared that they should approach the subject of amendment to the Constitution with respect for the rights of the minorities, and deliberately, with ample time for "consultation here" and with opportunities for full and frank consultation by the States and by the people. "We should take no advantage," said he, "of accidental majorities, but should secure to every

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 1640.

proposition of amendment the fair and considerate judgment of the authorities to which the Constitution confided the matter."

This was the strongest indictment of the conduct of his party friends in passing the measure at that session, and indicated that he would vote to give more time for the deliberation and fair opportunity to the people of the States to consider and determine on this momentous change in the Constitution.

Nevertheless, as a party man, he had determined to vote for the amendment if it were only confined to suffrage to Negroes, not trenching upon the Constitution of Rhode Island discriminating against naturalized foreigners. Proceeding further, he said: "But it seems plain that Congress has determined to submit to the States some proposition of amendment of the Constitution on the subject of suffrage; and this is the form of all those in which it has been presented, except the amendment of the Senator from Michigan [Mr. Howard] that strikes me as least objectionable."

He only found it the least objectionable. This was not a sufficient reason for supporting it, so he fell back on that heresy of Mr. Conkling, that in voting to submit a proposition of amendment to the States a Senator or Representative did not necessarily approve of the measure. On this point Mr. Anthony said: "In voting for it, I vote merely to present it to the States for their constitutional action; . . . and I by no means thereby surrender my right of judgment upon its ratification when the discussion shall come up in the State with whose high commission I am honored in this chamber." [1]

Mr. Wilson, of Massachusetts, had criticised the Constitution of Rhode Island on the question of suffrage. Replying to that, Mr. Anthony said he did not happen to be in the Senate when Mr. Wilson spoke, and he would not undertake to make defense of the State regulations on the subject.

"They suit us," continued Mr. Anthony; "I am sorry they do not please others; but they were not made for the people of Massachusetts; they were made for us, and whether right or wrong they suit us, and we intend to hold them; and we shall not ratify any amendment of the Constitution of the United States that contravenes them, and we have the satis-

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1640.

faction of knowing that without our State, the necessary number of twenty-eight States cannot be obtained for the ratification of any amendment whatever until new elections take place. What opportunity there will be then for it, other Senators can judge as well as I." [1]

Mr. Wilson: "Little Rhody takes the responsibility."

Mr. Anthony: "She takes the responsibility of managing her own affairs in her own way, and she takes the responsibility of exercising her constitutional right, which in this chamber and on this subject is equal to the constitutional right of any other State in the Union. If that is a mistake, it is a mistake which the fathers made; and the advantage of which we are not disposed to surrender."

Mr. Davis, of Kentucky, was manifestly impressed with this bold and manly assertion of the rights of Rhode Island to manage her own internal affairs as to suffrage in her own way and with the speaker's determination to stand by her in the exercise of the right, and he was disposed to inquire if Mr. Anthony would accord similar rights to other States. Not getting a satisfactory or direct answer, Mr. Davis said: "My honorable friend has not answered my question. My question is, is it right and proper that the two Houses of Congress shall change the Constitution and the government either of the State of Rhode Island or the State of Kentucky, in opposition to the wishes and the will of their people?"

Mr. Anthony: "As that is a private matter between my friend from Kentucky and myself, I will answer that question when the vote has been taken." [Laughter.]

Mr. Davis: "That is sufficient, sir." [Laughter.] [2]

Mr. Norton, of Minnesota, said: ". . . . I think it due to those members of the body who are opposed to this proposition, and I think it due to the country, that it should be made known that this proposition now at last when it comes to be passed does not receive the sanction in fact of two-thirds of the Senate."

He controverted the position of Mr. Anthony that a Senator could vote for the proposition when he disapproved of it; and then rely on making his opposition to it efficient by opposing its ratification by his State. He insisted that the true

[1] *Congressional Globe*, 3d Session, 40th Congress, p. 1640.
[2] *Ibid.*

meaning of the Constitution was that Senators should vote their honest opinions on proposals to amend the Constitution, and should vote to submit no amendment that in their judgment should not be ratified.[1]

Mr. Warner, of Alabama, wanted to enter his protest against the character of this amendment. He said: "While I shall probably vote for it in the shape it is, I shall do it rather in deference to the judgment of abler and wiser men than myself than in accordance with my deliberate judgment. . . .

"I have no doubt that if Mississippi, Texas, or Virginia were to come here with a Constitution containing these exact words which we now propose to put into the Constitution of the United States, she would not be admitted by this Senate. After the example of Georgia I do not believe that this Senate and this Congress would accept from one of these States a Constitution containing these identical words upon the question of suffrage and the rights of the colored people." [2]

Yet Mr. Warner and Mr. Anthony voted for the amendment.

Mr. Fowler, of Tennessee, said: "I understand it [the proposition to amend] to be simply the assertion of that principle, which has been maintained in a number of the States, and that it sanctions and sanctifies the action of the Georgia Legislature which has kept out two Senators from this body during the present session; and we arrive at this principle through the action of a gambling committee which, after the Senate and the House had adopted a more liberal and much better principle, shuffled the cards over again and gave us a new deal that will satisfy a certain number of gentlemen. The effect of it is to exclude from office a large number of the citizens of the Southern States merely to gratify a prejudice that exists in certain Northern States, who wish to heap heavy burdens upon the shoulders of other men that they will not touch with their own fingers." [3]

On the final vote, February 26, 1869, the majority was exactly two-thirds. Mr. Anthony was one of the majority, and if he had voted as he said his convictions were, the proposition to amend would have been defeated.

[1] *Congressional Globe,* 3d Session, 40th Congress, p. 1640.
[2] *Ibid.*, p. 1641.
[3] *Ibid.*

It is proper to note that Mr. Edmunds, Mr. Sumner, and Mr. Sawyer were among the absentees, of whom there were fourteen.

Of the loyal or adhering States, California, Delaware, Maryland, and Oregon rejected the amendment. Tennessee, reconstructed under Mr. Lincoln's plan, also rejected it. The Legislature of New York ratified it on April 14, 1869, and withdrew the ratification on January 5, 1870.

Six States rejected it without dispute. New York rejected it before it was ratified by the requisite number of States, having first accepted it. Ohio ratified on January 27, 1870, after having rejected it on May 4, 1869. New Jersey, after having rejected it, ratified it on February 21, 1871, after it had been proclaimed ratified. Mississippi, Texas, and Virginia ratified it under the provisions of the reconstruction acts requiring them to do so as a condition of representation.

Counting only the adhering or loyal States, with Tennessee, which had been readmitted, there were twenty-seven; and three-fourths of them would be nineteen, as the necessary number. Of these, six rejected and stood by the rejection. New Jersey and Ohio also rejected, making eight rejections and only nineteen acceptances.[1]

It is needful now to turn our attention to the three States, —Virginia, Texas, and Mississippi,—in which the reconstructed Constitutions had been defeated by the people. There was the usual amount of charges of intimidation made against the validity of these elections by the radical or Republican leaders in these States. But their attempt to have the Constitution fastened on the people failed. Whether this failure came from a reawakened conscience on the part of the leaders of the majority in Congress, or from the safe position they deemed themselves to have acquired by the reconstruction and admission of the seven other Southern States, it is needless to inquire. The majority in Congress of the Republicans, already overwhelming, had been largely increased by these reconstructed States, every one of which had sent Republican Senators and Representatives.

The Forty-first Congress met on March 4, 1869, the day on which General Grant was inaugurated President. All the States had been "reconstructed" except the three,—Texas,

[1] The Coercion of Virginia, Texas, and Mississippi.

Virginia, and the State of Mississippi. On April 10, 1869, an Act was passed authorizing a resubmission of the rejected Constitutions of these States for ratification or rejection by the people, with power given to the President to submit to a separate vote such provisions of said Constitutions as he should deem proper.

By Section 6 of the Act it was provided that before any one of these States should be admitted to representation its Legislature should ratify the Fifteenth Amendment.[1]

On May 14, 1869, the President issued his proclamation submitting the Constitution of Virginia, and designated two clauses thereof for separate submission. In order to show the animus of these reconstructed governments, it is needful to set out these provisions thus separately submitted.

The first was in these words, being a part of the fourth clause of Article III of the Constitution of Virginia: "Every person who was a Senator or Representative in Congress, or elector of President or Vice-president, or who held any office, civil or military, under the United States, or under any State, who, having previously taken an oath as a Member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, shall have engaged in insurrection or rebellion against the same, or given aid and comfort to the enemies thereof. This clause shall include the following officers: Governor, Lieutenant Governor, Secretary of State, Auditor of Public Accounts, Second Auditor, Register of the Land Office, State Treasurer, Attorney General, Sheriff, Sergeant of a city or town, Commissioner of the Revenue, County Surveyor, Constables, Overseers of the Poor, Commissioner of the Board of Public Works, Judges of the Supreme Court, Judges of the Circuit Court, Judges of the Court of Hustings, Justices of the County Court, Mayor, Recorder, Aldermen, Councilmen of a city or town, Coroners, Escheators, Inspectors of tobacco, flour, etc., Clerks of the Supreme, District, Circuit, and County Courts and of the Court of Hustings, and attorneys for the Commonwealth; Provided that the Legislature by a vote of three-fourths of both Houses remove the disabilities incurred by this clause from any person included therein by a separate vote in each case."

[1] 16 U. S. Statutes at Large, Chapter XVII, p. 41.

This clause contained the enumeration of officials who were to be excluded from voting in Virginia.

The other separate submission was of the seventh section of Article III of the Constitution, which prescribed the oath of officers in said State. What remained of the oath is as follows:

"I do solemnly swear that I will support and maintain the Constitution and laws of the United States and the Constitution and laws of the State of Virginia; that I recognize and accept the civil and political equality of all men before the law, and that I will faithfully perform the duties of the office of . . . . to the best of my ability."

The part separately submitted was in the following words:

"In addition to the foregoing oath of office, the Governor, Lieutenant Governor, Members of the General Assembly, Secretary of State, Auditor of Public Accounts, State Treasurer, Attorney General, and all persons elected to any convention to frame a Constitution for this State, or to amend or revise this Constitution in any manner, and the Mayor and Council of any City or Town, shall, before they enter into the duties of their respective offices, take and subscribe the following oath or affirmation, provided the disabilities therein contained may be individually removed by a three-fifths vote of the General Assembly. I, ————————, do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have never sought nor accepted nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government authority, power, or Constitution within the United States hostile or inimical thereto. And I do further swear (or affirm) that to the best of my knowledge and ability I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion, and that I will well and truly discharge the duties of the office on which I am about to enter, so help me God. The

above oath shall also be taken by all the city and county officers before entering upon their duties, and by all other State officers not included in the above provisions."

The Constitution was ratified, with the above provisions, separately submitted, voted out.

On July 13, 1869, the President by proclamation resubmitted the Constitution of Mississippi, with separate voting as follows:

First. A part of Section 3, Article VII, of the Constitution which prescribed the oath to be taken by all persons as a qualification for registering to vote in these words: "That I am not disfranchised by any of the provisions of the Acts known as the Reconstruction Acts of the Thirty-ninth and Fortieth Congresses, and that I admit the civil and political equality of all men, so help me God: Provided that if Congress shall at any time remove the disabilities of any persons disfranchised in the said reconstruction Acts of the Thirty-ninth and Fortieth Congresses (and the Legislature of this State shall concur therein), then so much of this oath, and so much only as refers to the said Reconstruction Acts, shall not be required of such person, so pardoned, to entitle him to be registered."

Second. Section 5 of the Constitution was also submitted separately. It was in the following words:

"No person shall be eligible to any office of profit or trust, civil or military, in this State, who, as a member of the Legislature, voted for the call of the convention that passed the ordinance of secession, or who, as a delegate to any convention, voted for or signed any ordinance of secession, or who gave voluntary aid, countenance, counsel, or encouragement to persons engaged in armed hostility to the United States, or who accepted or attempted to exercise the functions of any office, civil or military, under any authority or pretended government, authority, power, or Constitution within the United States, hostile or inimical thereto, except all persons who aided Reconstruction by voting for this convention or who have continuously advocated the assembling of this convention and shall continuously and in good faith advocate the acts of the same; but the Legislature may remove such disability: Provided that nothing in this section, except voting for or signing the ordinance of secession, shall be so construed as to exclude

from office the private soldier of the late so-called Confederate States army."

Third. A part of the oath of office contained in Section 26, Article XII of the Constitution, was submitted to a separate vote. This was in the following words:

"That I never as a member of any convention voted for or signed any ordinance of secession; that I have never as a member of any State Legislature voted for the call of any convention that passed any such ordinance.

"The above oath shall also be taken by all city and county officers before entering upon their duties, and by all other State officers not included in the above provision."

There was also separately submitted Section 5, Article XII of the Constitution, which was in the following words:

"The credit of the State shall not be pledged or bound in aid of any person, association, or corporation, nor shall the State hereafter become a stockholder in any corporation or association."

The Constitution was ratified with the above provisions separately submitted, except the last,—Section 5, Article XII, which was voted down.

On July 15, 1869, the President by proclamation resubmitted the Constitution of Texas, but without making any separate submission of any part of it. On that submission it was ratified.

It is needful to a proper understanding of the events I have alluded to, to give some account of the passage of the Act authorizing the resubmission of these Constitutions in the three States of Texas, Virginia, and Mississippi.

Early in the first session of the Forty-first Congress, Mr. Butler, of Massachusetts, from the Reconstruction Committee, introduced a bill to reconstruct the State of Mississippi. It is not necessary to set out more of this bill than to state that further reconstruction proceedings in that State were required to be taken by the Constitutional Convention that had framed the rejected Constitution. A leading Republican, Mr. Farnsworth, expressed some opposition to the bill and a preference for a postponement of the matter until the next session. As showing the animus of the movement, Mr. Butler said:

"Let me say, if we postpone it, we peril, in my judgment, not only the interest of Mississippi, but the interest of free-

dom and human rights throughout the nation. If Mississippi is reconstructed, as under this bill she will be, in the interest of freedom, the Fifteenth Amendment will be passed by the constitutional majority of three-fourths of the States. If we leave out Mississippi, we may not be able to get that majority." [1]

Mr. Farnsworth suggested in reply that if Mississippi were not reconstructed she need not be counted as one of the States on the question of ratification.

Mr. Butler replied, suggesting that Mississippi, if reconstructed, might and probably would ratify the Fifteenth Amendment, but if not reconstructed, she might be counted as against it, because she was not one of the three-fourths required to assent. Then he proceeded: "Let us not have the question open what States will be counted against us. I never want to see that brought to a test after we have gone as far as we have. I would rather take the chance of Mississippi being against us than take chance of having our constitutional provision for equal rights depend upon the decision of that great question of constitutional law over which nobody but the whole people can have jurisdiction, and which may be brought to a very stern arbitrament at some future time, whether these States are in or out of the Union for such purpose." [2]

Mr. Beck, of Kentucky, then made a great speech against the bill, in favor of further reconstruction proceedings under the control of the President. He introduced many interesting facts showing the infamy of the convention when it was assembled: how they had assumed unwarranted power, especially in the levying of extraordinary and illegal taxes. It is impossible to abstract this speech, but the reader is referred to it.[3] His attack was so vigorous that this bill was defeated. A new bill, embracing all the three States of Virginia, Texas, and Mississippi, was introduced and was passed in substance the same as the Act of April 10, 1869, now is, except as to two important amendments made in the Senate.[4] The bill passed the House on April 8, 1869,—yeas 125, nays 25.[5]

On the next day, April 9, it came up in the Senate.

[1] *Congressional Globe,* 1st Session, 41st Congress, p. 255.
[2] *Ibid.,* p. 255.
[3] *Ibid.,* p. 255 *et seq.*
[4] *Ibid.,* p. 633.
[5] *Ibid.,* p. 636.

Immediately Mr. Morton moved to amend by adding an additional section as follows:

"That before the States of Virginia, Mississippi, and Texas shall be admitted to representation in Congress, their several Legislatures, which may be hereafter lawfully organized, shall ratify the fifteenth article which has been proposed by Congress to the several States as an amendment to the Constitution of the United States." [1]

In the House no attempt was made to insert a similar provision. It will be remembered that, though General Butler deemed the reconstruction of Mississippi important in order to secure her assent to the Fifteenth Amendment, and that without such assent the loss of that amendment was possible, yet he did not, nor did the House, consider that this new condition was proper to be imposed on that State.

On the offering of the amendment, Mr. Trumbull opposed it, saying: "Congress, after very great deliberation, passed several bills on the subject of the reconstruction of the late rebel States, and proposed to them certain conditions, on compliance with which they were to be restored to their former relations with the Union, and this is the imposition of a new condition. When is this to stop? Is Congress at each session to impose a new condition when the States have gone on to take action under the laws as Congress enacted them?" He asserted his belief that these States would ratify the Fifteenth Amendment. "But," said he, "upon principle it is wrong . . . . to require it in advance. It is imposing a new condition; it is breaking faith on the part of the Government of the United States with these people, who have been proceeding under our acts to do those very things on the completion of which you have told them, 'You shall be restored to your relations with the Union.' " [2]

Mr. Morton, in reply, claimed that his amendment was no breach of faith. "These States have not accepted the conditions we proposed to them. How are we bound? They have accepted nothing; but they have stood out in hostility up to this time against the terms we have offered. . . .

"Some of the reconstructed States would not have ratified the fourteenth article, if they had not been required to do it

[1] *Congressional Globe,* 1st Session, 41st Congress, p. 653.
[2] *Ibid.,* p. 654.

as a condition of representation. These States have stood out; they have been hostile to our plan of reconstruction until another amendment has become necessary. . . ."

This was said because these States had voted down Constitutions containing the provisions of disfranchisement and dishonor that we have copied and that were more severe than was required in the reconstruction Acts. So severe indeed were they that General Grant, under the Act of Congress, submitted these provisions to a separate vote.

Mr. Morton, however, exposed the true motive for the amendment as he proceeded further in his speech.

He said: "It is important that we have this question settled, that it shall not hang over the States for the next four years.

"So far as I am concerned, I would rather see this bill fail than to pass without this amendment attached to it. I would rather see the whole matter go over to the next session of Congress. I will speak frankly here on the subject. I know what the expectation of the opposing party is. They know the prejudice that has existed in the Western States in regard to Negro suffrage, and I know that the Democratic party desire to keep this question open as an element of political success in the elections of 1870 and '72." He then referred to the action of the Democratic members of the Legislature of Indiana in resigning in order to prevent a quorum, and thereby prevent action on the amendment. "They have made the calculation that without the votes of Virginia, Texas, and Mississippi the amendment cannot be ratified unless it receives the vote of Indiana. Indiana they regard, therefore, as a pivotal State upon which the ratification of the amendment is to turn; but if it shall be ratified by these three unreconstructed States, it will then become a part of the Constitution without the vote of Indiana. . . .

"Now, sir, if we shall make the ratification of the fifteenth article a condition of the reconstruction of these States, just as we did the ratification of the fourteenth article, these States will accept it at once; they will ratify it without a moment's delay, and then it will become a part of the Constitution; the question will be taken out of our politics forever, and the Democratic revolution in Indiana will have failed; otherwise the question will be kept open during the elections of 1870

and 1872. Therefore, I repeat, I would rather see this bill fail and the whole matter go over until the next session of Congress than to have it pass without this amendment. Sir, it is right in itself. There is no breach of faith involved. It is of vast importance to the country, and it is of vast importance to the party to which I claim to belong." [1]

Mr. Morton made no concealment. He spoke, as he said, frankly. He wanted the amendment requiring these three Southern States to ratify the amendment because it might be necessary to have their votes to secure its ratification. He feared to encounter the opposition in the Western States to Negro suffrage in the elections of 1870 and 1872. He considered its ratification by these States as of vast importance to his party, and he was for forcing them to ratify.

Mr. Conkling controverted Mr. Morton's position that the passing of his amendment would be no breach of faith. He stated that Virginia was prevented by Congress from accepting the Fourteenth Amendment.

"In consequence of her calamity alone, with no default, unless it be our default, she is not here." He said that this new condition was never thought of by the Republicans and never hinted to any of the Southern States. He declared himself a friend of the Fifteenth Amendment, but he "earnestly" hoped that "no process involving the force . . . . of this proposition will be resorted to as a means of promoting that amendment." "If," he continued, "it can be carried at all, it must be carried before the honest sense, the enlightened judgment of the American people; and as far as it is, even by inadvertence, associated with unfair dealing, with a breach of faith, with an act which would be deemed overreaching between man and man and recreant looking to the plighted faith of a great Government [*sic*] so far as it is associated with anything like that, in so far it is contaminated by a stigma and a distrust which ought not to rest upon it."

Mr. Thurman opposed the amendment with great force. He declared that the amendment did not concern Texas, Virginia, and Mississippi, but every State in the Union. The power given to Congress is simply a power to propose amendments to the Constitution, and when Congress has executed that power, it is *functus officio*. It has no right to coerce

[1] *Congressional Globe*, 1st Session, 41st Congress, p. 654.

the States into action on them. "The States are entitled to their free and unbiased judgment upon the proposition that Congress is authorized to submit. The power of Congress is at an end when it has made the proposition. But now the Senator from Indiana proposes that Congress shall not only propose an amendment to the Constitution, but that Congress shall coerce three States into the adoption of that amendment, not for themselves alone, but for every State in the Union."

He continued: "When you coerce Virginia, Mississippi, and Texas to put this article in the Constitution . . . . you do not coerce them alone. You coerce Ohio, you coerce Indiana, you coerce Illinois, you coerce every State whose people are unwilling to adopt the amendment."

He said that, as he understood the Senator, it was for the express purpose of coercing Indiana that he wished his amendment to be inserted in the bill.

Mr. Morton explained that it was not to override the people of Indiana, but to override a revolutionary movement in Indiana that he offered his amendment.

Mr. Thurman replied that Mr. Morton's explanation did not relieve the difficulty. "If the people of Indiana are in favor of ratifying the Fifteenth Amendment to the Constitution, why is the Senator from Indiana afraid to trust them with the question? Why does he wish this question passed upon by a Legislature that was elected upon no such issue, that was elected upon the Chicago platform, which declared that to every loyal State,—and he will not deny that Indiana is a loyal State,—belonged the right to decide for itself who should enjoy the privilege of suffrage within it? It was upon that solemn pledge that you got a Republican majority in the State of Indiana; a State that not only voted against Negro suffrage, but adopted its present Constitution, by which Negroes are even prohibited from migrating to the State, by ninety-one thousand majority. Now, I say, if the people of Indiana are in favor of the amendment, they can be trusted to adopt it."

Mr. Thurman, replying to the statement that the resignation of the Democratic members of the Legislature of Indiana to break a quorum in order to defeat ratification of the amendment was revolutionary, referred to a similar action once

taken in Ohio by the Whig members of the Legislature to defeat an unjust apportionment. He continued: "There are times when it is the duty of a minority to prevent the passage of an Act which they firmly believe is contrary to the will of the people of their State. It is a lawful mode. . . . I grant it is a measure to be resorted to only in the last resort; it is an extreme measure; but no man is bound to hold office. If he sees fit, therefore, to resign his office in order to allow the people to pass upon a question, there is no right to say that that is a revolutionary measure. How do the people of Indiana think about it, pray? Every man who resigned has been returned to his seat in that Legislature. In almost every district those in favor of the Fifteenth Amendment did not even dare to run a candidate. In one district they did; and that was a district which had been changed after the election of the Senator, by striking off, I believe, a Democratic county and putting on a Republican county, and the district was largely Republican at the last Presidential election. What was the result in that district? A most eminent man was set up by the Republican party against the resigning Senator,—a man of character, of talents, a man remarkable for his power on the stump as I am told, an elector for President, I think, at the last election in Indiana? What was the result in that district, now largely Republican? Why, sir, that man was beaten some four, five, or six hundred votes. I think, then, it may be well assumed here that the people of Indiana are not in favor of the Fifteenth Amendment." [1]

Mr. Morton did not controvert these statements of Mr. Thurman.

The amendment of Mr. Morton was adopted by yeas 30, nays 20. Among the nays were Messrs. Anthony, Conkling, Edmunds, Fenton, Ferry, Fessenden, and Sprague.

Messrs. Sherman and Howard, notwithstanding they had declared, as we have seen, that the imposition of another condition, even a "jot or tittle," would be a gross breach of faith on the part of Congress, voted in the affirmative.

Mr. Edmunds then moved an amendment in these words:

"That the proceedings in any of said States shall not be deemed final, or operate as a complete restoration thereof, until their action, respectively, shall be approved by Congress."

[1] *Congressional Globe,* 1st Session, 41st Congress, p. 655.

This was agreed to.[1] Then two of the Senators,—Mr. Davis, of Kentucky, and Mr. Fowler, of Tennessee,—made strong speeches against the bill.

Mr. Bayard spoke in opposition to the bill. He said: ". . . . I do not propose to discuss the condition of the people of these three Southern States so-called. I could not trust myself to do it, and run through the dreary, wretched catalogue of wrongs to which they have been subjected. It was truly said by the Senator from Oregon [Mr. Williams] in reply to a remark of the Senator from New York [Mr. Conkling] that it was too late upon this floor to talk of good faith to the people of the Southern States. Alas! sir, that is too true; for it would be idle to talk of keeping faith when the lips that profess it have violated it so often toward them." [2]

In replying to Mr. Conkling, as above alluded to, Mr. Williams had said: "The objection made is, as I understand it, that it will be regarded as a breach of good faith toward the States not now reconstructed, to incorporate such an amendment [Mr. Morton's] into this bill, but I think it is too late in the day to talk about good faith in reference to these States." [3] He then proceeded to accuse Mr. Conkling of a breach of that faith, which Mr. Conkling denied.

Mr. Bayard next spoke of the effect of this Fifteenth Amendment upon the other States, and he declared "that your proposed submission of the Fifteenth Constitutional Amendment to the untrammeled vote of the different States is turned to dust and ashes; when you yourselves create the votes that shall overcome the natural majority against you. Congress, by its own terms, usurps the power to cast the votes of three States in the interests of a partisan majority; and that you call a ratification under the Constitution of an amendment of a fundamental law." [4]

Mr. Bayard claimed that it had been demonstrated by Mr. Thurman that coercion of the Southern States was also a coercion of the Northern States.

He said: "Talk of the free choice of Indiana, Ohio, or New York! What is it, when Congress can by law insist that the votes of certain States shall be cast in opposition to it? All freedom is gone, sir, when Congress adopts such a meas-

[1] *Congressional Globe,* 1st Session, 41st Congress, p. 657.
[2] *Ibid.,* p. 660. [3] *Ibid.,* p. 654. [4] *Ibid.,* p. 660.

ure as this; it is doing nothing less than playing with cogged dice. It is the intention, therefore, by a measure like this to destroy, first, all shadow of freedom in the exercise of their opinions by the people of these three States, and next, having destroyed that, to make their votes the instrument whereby you crush out the sentiment of the Northern States. *Per fas aut nefas* seems to me to be the rule by which this amendment is to be forced on the American people; and the question will come up,—it cannot be long kept down,—how any law, how any amendment obtained by means like this, can be binding upon the conscience of a people who have either the sense or the manhood to remain free." [1]

The bill as amended passed,—yeas 44, nays 9. Messrs. Trumbull and Conkling voted for it, notwithstanding the breach of faith involved in it.

In the House the Senate amendments were concurred in by a vote of 107 yeas to 39 nays. There was no debate.[2]

So the States of Virginia, Texas, and Mississippi were coerced into voting for the Fifteenth Amendment. Without the vote of at least one of these States the Fifteenth Amendment would have failed to pass.

[1] *Congressional Globe,* 1st Session, 41st Congress, p. 660.
[2] *Ibid.,* pp. 699-700.

APPENDIX

VIEWS

OF THE

MINORITY OF THE JUDICIARY COMMITTEE

OF THE

UNITED STATES SENATE

ON

THE CONSTITUTIONAL QUESTIONS INVOLVED IN THE BILL TO PROVIDE FOR INQUESTS UNDER NATIONAL AUTHORITY

IN THE SENATE OF THE UNITED STATES.

February 25, 1887.—Order to be printed.

MR. GEORGE, from the Committee on the Judiciary, submitted the following

VIEWS OF THE MINORITY

Which he Wrote

[To accompany bill S. 2171.]

The undersigned, a minority of the Committee on the Judiciary, are unable to agree with the majority as to either the expediency or the constitutionality of Senate bill No. 2171, "to provide for inquests under national authority."

Sanctioned as the bill is by a majority of the members of this committee, it comes before the Senate with the prestige of the high character and eminent abilities of its framers and supporters. In opposing it on constitutional grounds we admit that it is incumbent on us to show by the clearest reasoning and the highest judicial authority that this bill is, as we believe it to be, unwarranted by the Constitution, and, if enacted, would be a grave and serious usurpation by Congress of essential powers reserved to the States, and that the means by which the inquest is to be made are equally in violation of that instrument.

This must be our apology for that elaboration of argument necessary to make due and proper inquiry into and examination of the questions involved in the bill.

The bill provides that on the application of any three citizens of the State in which the injury shall be committed the United States circuit judge shall order a special term of his court to be held, and shall then summon witnesses and inquire into the facts connected with any alleged homicide committed, or serious bodily harm, or serious injury in person or estate, perpetrated or threatened, where such offense has been committed: (1) "Because of the race or color of such person so killed, injured, or threatened; (2) or because of any political opinion which such person so killed, injured, or threatened may have held in regard to matters affecting the general welfare of the United States; (3) or with design to prevent such person so killed, injured, or threatened, or others, from expressing fully such opinion; (4) or from voting as he or they may see fit at any election of officers whose election is provided for by the Constitution and laws of the United States; (5) or to affect the votes of such person or others at such elections."

And the bill further requires the judge to report the evidence thus by him taken, and his conclusion of facts thereon, to the President of the United States, to be by him laid before Congress.

No other action by the judge or court is required or even contemplated.

The theory of the bill, however, must necessarily assume that Congress may, when the report is submitted to it, make it the basis of legislative action in respect to all the matters named in it. That is, the bill asserts a power in Congress to legislate for the protection of the rights and for the punishment of the wrongs specified in it. These alleged rights, except in the two last clauses, which refer alone to voting at Federal elections, are the right to security in person and estate against assaults made or threatened by the wrongful acts of private individuals, if such assaults were made because of race or color or of holding or expressing political opinions. Or, in other words, jurisdiction is asserted in the Federal Government over all injuries to person or property, committed or threatened, where the perpetrator and the victim are not both of the same race and also of the same political party. For it is manifest that where they are of different races and of different political parties it will be impossible, as to the former at all times, and as to the latter in times (very frequent and prolonged) of high political excitement, to eliminate these circumstances from such transactions.

But the bill even goes further than this. If three men can be found in a State who will make oath according to their belief that any conflict, either actual or apprehended, any injury to person or estate, consummated or threatened, had for its basis any of the reasons and the causes mentioned in the bill, the court must undertake the investigation "into the circumstances" of such killing, injury, or threatening, and report the evidence taken and the conclusions of fact to the President, notwithstanding it may be established that the transaction, whatever it may be, had no such cause or basis, and was in fact between persons of the same race and color and of the same political party, and was the result of causes wholly different from those mentioned in the bill, and even of causes which rendered the conduct of the actor entirely justifiable.

The bill contains so serious an attack on the power, jurisdiction, and dignity of the States, is so harmful in its effects, so utterly at variance with the Constitution, and being directed in the main, as this avowedly is, against the Southern

States exclusively, that we feel that we are not only warranted, but required, to make such examination into the powers, jurisdictions, and rights of the States, and the powers of Congress, as may be necessary to defeat it.

We shall therefore inquire as to the depository nature and extent under our system of the governmental powers to protect the rights of persons and property against assaults and violations by private individuals, when such wrongs are committed or threatened within the limits or jurisdiction of a State. To make this examination full and perfect it is necessary to consider somewhat carefully the nature, purposes, and objects, as well as the powers of the Government of the United States, in connection with the powers and duties of the States; and also the scheme of government which the two combined have formed.

FEDERAL AND STATE GOVERNMENTS BOTH PARTS OF A WHOLE

The Federal and State Governments are complements of each other; both are essential parts of a whole. To conceive a government having sole jurisdiction over a people, but with no other powers than those granted to the Federal Government by the Constitution of the United States, would be to conceive an anomaly as well as an impotent abortion. Such a government would possess no power over contracts, over marriage and divorce, the civil relations of husband and wife, over descents, inheritances, and testaments, over titles and tenures to property, over the great fundamental rights of life, liberty, and property, and the pursuit and acquisition of happiness. On the other hand, a government considered as a whole and not as a complement of another, which possessed no other powers than those now belonging to the States, would be utterly powerless outside its own territorial domain and without essential powers within it. It could possess no army, no navy, grant no patents or copyrights, coin no money, emit no bills of credit, fix no standard of weights and measures, levy no tonnage, duties, or taxes on imports or exports, receive or send no ambassadors, ministers, or consuls, enter into no treaties or alliances, nor regulate in any

way commerce between itself and other states or foreign nations. It could neither make war nor conclude peace.

"We have in our political system," says Chief Justice Waite, in United States *v.* Cruikshank, 92 U. S., p. 549, "a Government of the United States and a government of each of the several States." And Judge Miller, in the "Slaughter-House Cases" (16 Wall., p. 82), said that "the existence of the States was essential to the perfect working of our complex form of Government"; complex in this, that we have two distinct governments, operating on and regulating the rights and duties of the same people, each having distinct and separate powers, and charged with distinct and separate duties. No citizen of a State can look to either government for the measure of his allegiance, or as the sole protector of his rights. The system is, that the people of each State may with exact truth be said to have two constitutions,—one their own separate constitution, under which they exercise State powers and perform State duties solely, and according to their own judgment as to what is best for the common weal; the other the Constitution of the United States, which is the common Constitution of each and of all the States, and under which each discharges Federal functions in connection with its sister States. Both are essential to perform the full measure of governmental functions and protect and secure the people in all their rights. Chief Justice Waite, in United States *v.* Cruikshank (92 U. S., p. 550), speaking for the Supreme Court, used this expressive language:

"The people of the United States resident within any State are subject to two governments,—one State, one national. The powers which one possesses the other does not. They were established for different purposes, and have separate jurisdictions. *Together they make one whole, and furnish the people of the United States with a complete Government,* ample for the protection of all their rights at home and abroad."

This great and fundamental truth is so often obscured and neglected in practice that we deem it our duty to endeavor to recall it to the attention of the Senate and of the country.

THE UNITED STATES THE FINAL JUDGES OF THEIR OWN POWERS

It is no part of our purpose to reopen the question of State rights, as settled by the late war. Whatever of power was lost to the States by that conflict, we acknowledge is lost irrevocably; whatever was gained in it by the United States is an acquisition that we shall not attempt to disturb. Whatever may be the mere historical truth as to the mode of the formation of the Federal Constitution,—whether it was created by the people of the several States, or by the people of the United States aggregated in one mass,—it is now no longer a matter of dispute, that the powers granted to the Federal Government by the Constitution of the United States are irrevocable except by successful revolution. It is also now established that the Government created by it is, through its Judicial Department, the final judge of the extent of all its granted powers which can by their nature come under review in a case in a court, and that the political departments of the Government are the final judges of the extent of all the other granted powers. The right of State interposition to arrest usurpation by the Federal Government, whether by nullification or secession, if it ever existed, has now gone forever. We concede this fully and unreservedly.

This great power of final arbitrament carries with it the highest and most solemn duty to judge carefully,—impartially,—not to usurp on the one hand powers not granted, nor on the other to abdicate duties imposed on the Government by the Constitution. The people have a right to demand that the agents and officers of the Federal Government, which, though limited in the number of its powers, is supreme wherever its powers extend, shall be careful not to disturb or disarrange the scheme of government which they ordained, nor alter the divisions of powers between the two governments which they have established.

THE STATES ESSENTIAL BASES OF OUR SYSTEM

The Federal Constitution, whether framed by the people of the several States,—the people of each State acting for their State,—and as a political organization known as a State,

or not, came after the formation of the States. It is based on the previous existence and on the subsequently continued life of the States. Without States then existing it could not have been created. It had no force as a constitution till ratified by nine States, and then only "between the States ratifying" it. After its ratification, it could not have gone into operation except by and through the active agency and co-operation of the States existing as separate political entities, and acting as separate and distinct political organisms. No President could then have been, nor can now be, constitutionally elected, except by electors, whom, by the terms of the Constitution itself, "each *State* shall appoint in such manner as the legislature thereof may direct." No Representative could be elected, nor can now be, except by voters whose qualifications are to be fixed by the *State* from which he comes. Representatives are "apportioned among the several *States,*" and Senators, "two from each *State,*" are "chosen by the legislature thereof"; and each Senator and Representative must be "an inhabitant of that *State* in which (or for which) he shall be chosen." The words "State" and "United States" appear everywhere in the Constitution, in every article, and almost in every clause and sentence. Strike them from the Constitution and the Government would be without a name among the nations of the earth and the whole instrument would be unmeaning jargon, with no intelligent ideas left in it. The name of the Government itself created by the Constitution is "United States." The Constitution, as itself declares, was ordained and established "for the United States of America." The legislative power is vested not in a legislature, or parliament, or national assembly, but in "the Congress [that is, the meeting or assembling] of the United States." The executive power is vested, not in a king, or emperor, or consul, but in a "President of the *United States;*" all other officers are "officers of the *United States.*" The "militia of the several States" are "called into the service of the *United* States" and not into the service of the Government, or the President, or the Congress. The judicial power of "the *United States,*" not of the Government or Congress, is "vested" in courts provided for in the Constitution. These courts have jurisdiction "in controversies to which the *United States* shall be a party;" and between "two or more *States;*"

and "between citizens of different States." Trials of crimes "shall be in the *State*" where committed. And "treason against the United States," not against Congress, the President, or the Government, or the Union, is committed only "by levying war against *them* or in adhering to *their* enemies." Essential powers are recognized in the States, and equally important powers prohibited to them by that name, and duties are imposed on them as "States."

In the attestation clause of the Constitution it is said: "Done in convention, by the unanimous consent of the *States* present," and this attestation is signed by George Washington, as President, "and deputy from Virginia," and by the deputies from each of the twelve States present, each being separately named, Rhode Island not being present. And in the tenth amendment it is declared that all the powers granted by the Constitution are "delegated to the *United States,*" not to Congress, the President, the Government, or the Union. And in the Fourteenth Amendment the public debt is declared to be the debt "of the United States," and the "United States" are prohibited from assuming any debt incurred in aid of "rebellion or insurrection against the United States," and in the Fifteenth Amendment "the United States" and the several "States" are prohibited from denying or abridging the right to vote in certain cases.

Whilst it is true that the scheme of the Constitution was "to make us one people, with one common country, for all the great *purposes for which it was established,*" as was said by Chief Justice Taney, it is also true, as declared by Chief Justice Marshall, in McCulloch *v.* Maryland, 4 Wheaton, 403, that "no political dreamer was ever wild enough to think of breaking down the lines which separate the States and compounding the American people into one common mass." And it is also true that the American people, considered as one common mass, and not as the people of the several States, cannot perform any single function or exercise any single political power without in effect revolutionizing our whole system.

We recall these familiar truths, found on the face of the Constitution and expressed in its very words, because their import and effect seem to have lost their significance in some quarters.

STATES ARE FREE, EQUAL, AND SOVEREIGN

It is undisputed that the States were free, equal, sovereign, and independent at the time of the formation of the Constitution; that each possessed all the powers which any government might rightfully possess. In the language of the Declaration of Independence, "had they full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do."

As such States they formed a Union under the Articles of Confederation, and as such they withdrew from that Union, each for itself, by a separate ratification of the Constitution of the United States, and contrary to the will of at least two of their number. As we have said, it is probably immaterial whether we regard the historical truth,—that the States formed the Federal Constitution,—as a constitutional truth or not, for the main questions which depended upon that are settled. The truth is undeniable that each State, or the people of each State in their separate capacity as organized political communities, organized into States, possessed at the adoption of the Constitution all governmental power. It is equally true that, possessing these powers, they had the right to alter their governments, "and to institute a new government, organizing its powers in such form as to them shall [should] seem most likely to effect their safety and happiness." They did so alter and organize it, delegating each separate State, a part of its own powers, to be exercised by the whole, *i. e.,* the United States, and reserving each to itself separately, or to its people, the great mass of powers not delegated. The government thus formed was a government of each of the States, having jurisdiction to the fullest extent of the undelegated and unprohibited powers, and a Government of the United States. The Government of the "United States" meant no more then, and means no more now, than the common or general government of the States of Massachusetts, New York, Virginia, and the others united. The phrase "United States" means no more nor less than the thirteen States then and the thirty-eight States now, united for the purposes mentioned in the instrument of Union, —the Constitution of the United States of America.

POWERS CONFERRED ON UNITED STATES SUPREME

The common or general powers thus conferred on the whole (not any power usurped) are necessarily supreme as against any adverse separate State action. This resulted logically from the mere fact of the establishment of a common Constitution, since the surrender by each State, or by the people of each, of powers to a common agency to be exercised by such agency for the good of all the States, necessarily implied an engagement on the part of each and all to submit to the exercise of the powers so surrendered by the agency appointed for all and by all. A lawful refusal to do this would be in itself a disruption of the common Government thus formed, since it would leave this common Government without authority to do the very thing for which it was established. The declaration in Article 6, that "this Constitution, and the laws of the United States which shall be made in *pursuance* thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; . . . anything in the constitution or laws of any State to the contrary notwithstanding," is nothing more than the expression of what, without it, is an undoubted truth.

Speaking of the supremacy of the Government of the Union, in McCulloch *v.* Maryland, 4 Wh., 405, Chief Justice Marshall said:

"This would seem to result, necessarily, from its nature. It is the Government of all; its powers are delegated by all, it represents all, and acts for all."

But whilst this is true, it is also true that this supremacy of the Constitution and of the laws and treaties authorized by it is expressly limited within the line which bounds the delegated powers. Beyond this the Government of the United States has no power whatever, and its acts outside of and beyond these powers are in law simply null, mere nothing. We quote on this point the expressive words of Chief Justice Waite, speaking for the Supreme Court in United States *v.* Cruikshank (92 U. S., p. 550):

"The Government thus established and defined is to some extent a Government of the States in their political capacity. It is also for certain purposes a Government of the people.

Its powers are limited in number, but not in degree. Within the scope of its powers as *enumerated and defined it is supreme and above the States; but beyond it has no existence."*

Mark the expression,—beyond its enumerated and defined powers "it has no existence."

THE UNION IS VOLUNTARY AND OF EQUAL STATES

Another great truth lies at the foundation of the Constitution, and which must never be forgotten or obscured in considering the relations of the several States under it, with each other and with their common Government,—the Government of the United States. It is that this Union under the Constitution was in its formation the voluntary association of free and equal States, each free to go in or to stay out; each equal in its Federal and in its reserved rights; equal in dignity; equal in all political capacities. Each State acceding to it (or the people of each State, if that expression be preferred) claimed the capacity to discharge all its Federal duties arising under the Constitution, as well as its capacity to exercise all the powers of government reserved to it.

This claim was acknowledged by each and by all, and was, in fact, the very basis of the Union as it was formed. If any one of the then existing thirteen States had contrary convictions which rendered association and union with any of the others undesirable, it had the undoubted right to refuse accession to the Union. It had the undoubted power to decide this question for itself, and did decide it irrevocably when it ratified the Constitution. That decision involved and solemnly adjudged the essential truth that its co-States were such as it claimed itself to be, capable and willing to perform both their Federal and their separate State functions without the supervision or interference of others. As to new States, each original State which had acceded to the Union agreed by the Constitution itself,—the supreme law of the land,—to abide by the decision of the Congress of all the States, and each new State in accepting admission into the Union made the same concessions and admissions as to all the other States.

This great and fundamental truth, if it needed further

support, has it in the terms of the Constitution itself. *That* they all agreed should be the supreme law of the land. That instrument not only owes its existence to the action of the people of the several States; but the continuous operation of the Government it established could come only from their voluntary action. The Constitution imposed duties on them, the continued performance of which was essential to the Government, as has been shown. It contained no provision for a failure of any State to discharge its Federal functions, but it assumed that all would, and it left to each as a matter for its sole concern, the discharge of its own separate State functions. It contained no provision for disfranchising States for a neglect of their duties, nor for compelling the States to perform them. It recognized no inequality and no incapacity, no contumacy in States, and made no provision and conferred no powers for such cases.

It imposed no restrictions or limitations upon the rights and power of one State that were not equally imposed on all the others. It prescribed no duties to the States with reference to their undoubted rights and powers over their own citizens. It secured no rights to citizens against adverse action or adverse non-action of their State, except in the imposition of prohibitions on the exercise of a few arbitrary and despotic powers of government, which by the common consent of free people were deemed unsafe and unfit to be exercised by any government, and which we shall notice more particularly hereafter.

In the performance of this grand work,—the creation of the Constitution of the United States, and of the Union under it,—the grandest ever performed by any of the human race, there was, in the processes of its formation, in its express or implied provisions, no arrogated superiority, no assumed mastery on the part of any State, or the people of any State, over any other, and no distrust in the ability and good faith of any State or its people.

Massachusetts did not say to Virginia, "We distrust your ability or willingness to perform your Federal duties, or to govern in all that has not been surrendered by you to the common Government, nor prohibited to you and all other States alike;" nor did Virginia doubt Massachusetts in any of these things. There was mutual trust and confidence all

around and on all sides. Without these the Constitution could not have been formed, and without them cannot be preserved. This confidence and trust were manifested in all that was done, and were attested and sealed by the declaration in the Constitution that it was the supreme law of the land, binding on all States, all magistrates, and all persons, and binding also on the agencies, the magistrates, the officers of the common Government.

This supremacy of the Constitution is universal, all-pervading, binding equally as to its negations, the reservations to the States as to the powers delegated to the Union, the things granted and the things not granted; binding as well to destroy, to make null, all that might be done or assumed to be done by the General Government outside of and beyond its powers, as to invalidate any State action within this exclusive domain. It was a double guarantee, as strong and as explicit against Federal usurpation of powers not granted as against State aggression on the delegated sovereignty of the Union.

We have now seen how the Constitution was formed, the spirit which animates its every clause, the temper, the good faith of men and States, their confidence in their fellowmen and co-States, the concession by each and all the States of the capacity and willingness of the people of each to discharge their Federal and national duties, and to exercise justly and fairly their reserved powers, and the entire absence of any provisions giving either to the common Government or to any of the States power to interfere in or control the administration in any State, of its reserved powers or jurisdiction. We may pause a moment to contrast this with the provisions of the present bill, which repudiates all this and seeks to establish an inquisition under national authority into the exercise by some of the States of their exclusive internal domestic jurisdiction. This inquisition is degrading to the States in which it is expected to be carried on; it impeaches their capacity and willingness to perform their separate and exclusive functions; it asserts, in the shape of a law, a supercilious and arrogant superiority on the part of some States over other States; it usurps a jurisdiction unwarranted by the Constitution.

POWERS OF THE UNITED STATES ARE DELEGATED

Looking to the whole scheme of our complex system of Federal and State governments, we find that its primal, fundamental principle, the key to its exposition is, that the powers possessed by the United States are "delegated," that is, given or granted to them, by some political organism, or organisms, and are in no sense inherent or original. Before any of these powers were thus granted, there were no powers in the United States, in fact no United States existed. The United States, as they now exist as a Government, were created by the Constitution. That instrument, in the act of making the States united under it, dissolved their union under the Articles of Confederation.

The Tenth Amendment, adopted almost contemporaneously with the Constitution, and designed to put into constitutional form a great truth, then recognized by all, so as to prevent mistake or misconception in all after times, expressly declares that the powers possessed by the United States are "delegated," and all other powers not "prohibited" to the States are "reserved," not granted, not given, but "reserved" to the "States respectively"; not to the States in a mass, or aggregated, or united, but to the States "respectively," or to the people. The powers are not even said to be "vested" in the United States, when reference is made to their origin. They are only "delegated," and then they are said to be "vested" in the Government, and in its various departments as a consequence of this delegation. The powers thus "delegated" are not the great mass of the powers of government, with exceptions in favor of the States, but they are enumerated, specified, written in the Constitution itself, and defined and limited by it.

THE GENERAL SCHEME OF THE CONSTITUTION

The scheme of the Constitution was to make us "one people, with one common country, for all the great purposes for which it was established." (See Chief Justice Taney in Passenger Cases, 7 How. R., 283.)

These great purposes are expressed in the Constitution itself, in the powers delegated by it to the United States. These

powers are plenary and exclusive as to all that concerns the people and States in their relations with foreign powers, both in peace and in war, including the making of treaties, the receiving and sending of ambassadors, ministers, and consuls; making war and concluding peace; intercourse and commerce with them; the protection of our people in foreign countries and outside of the jurisdiction of any State, and on the high seas.

Secondly. The Federal powers extend to the regulation of relations between the States themselves and the citizens of each with the citizens of the others, and between each of the States and the United States, covering commerce among the States, compacts between two or more of them, the duty of surrendering fugitives from justice and labor, the force and effect in other States of public records and judicial proceedings of each State; "the securing to the citizens of each State the privileges and immunities of the citizens of the several States," when in the jurisdiction of any State of which they are not citizens, leaving, however, to each State to determine and define the rights and privileges of its own citizens, and securing only these same privileges so defined by a State to citizens of other States when they are within its jurisdiction.

Thirdly. The power and duty to guarantee to each State a republican form of government, and to protect it from invasion, or, on application of the State, from domestic and foreign violence. These were the great purposes for which the Constitution was formed and adequate powers to attain them were granted.

All other powers delegated to the United States are either merely auxiliary to these great ends and for the support and maintenance of the common government, or they are such as can conveniently and properly be exercised only by a government common to all the States. These auxiliary powers relate to the establishment of a uniform system of bankruptcy and naturalization laws; the power to coin money, to regulate its value, and the value of foreign coins in circulation here; to fix the standard of weights and measures; to grant patents and copyrights; to establish post-offices and post-roads; the power of taxation; to punish counterfeiting of the current coin and securities of the United States; to punish piracies and felonies on the high seas and offenses against the law of nations; to

raise and support armies and to support and maintain a navy; and certain powers over the militia.

These powers, in general terms, include all that are delegated to the United States. If we stop and consider them, we will see how few they are,—great indeed in importance, unlimited in degree, but very limited in number. If we abstract from these powers all that relate to our intercourse with foreign nations,—all that concern the relations of the States with each other, in their character as States, and their relations to the Union; all that relate only to giving force, efficacy, and support to the United States in their exercise of their other powers,—we will see how infinitely small in number are all the remaining powers, which concern only the rights, privileges, and convenience of private persons,—private citizens when in the jurisdiction of a State.

These powers are:

(1) The securing to the citizens of the several States the privileges and immunities granted by any State in whose jurisdiction they may be to its own citizens.

(2) Jurisdiction over bankruptcy.

(3) Jurisdiction over naturalization.

(4) Jurisdiction over the currency.

(5) The power to establish post-offices and post-roads.

We look in vain to any of these powers for the power to enact this bill. But along with these powers come provisions which show the soul and spirit of the Constitution, and without which the Constitution either becomes a lifeless corpse or, having energy and vitality, is an instrument only of oppression and wrong. These provisions recognize the absolute equality of the States, and secure fairness and impartiality in the exercise of the powers granted by the Constitution. Thus, direct taxes are required to be apportioned among the States according to their population, and all duties, imposts, and excises are required to be uniform throughout the United States; no preference is allowed in any regulation of commerce or revenue to the ports of one State over the ports of another; the levying of a tax on any article exported from any State is also prohibited, whereby the dangerous power of taxing articles mainly produced in one State or section and not in others is denied to the Government.

And then there is the great provision in Article 5, which

secures absolutely and forever the equal suffrage in the Senate of each State against even an amendment of the Constitution. Under this guarantee of equality Delaware, Rhode Island, and Nevada each have the same voice in this body as the great State of New York, and under it the six New England States, with a population entitling them only to 24 Representatives out of 325 allotted to all, have twelve Senators, whilst all the other States, with a population entitling them to 301 Representatives, have together only 64 Senators. New England has one Senator for a population entitling her to two Representatives, whilst the remainder of the States have one Senator to a population represented by 4.54 Representatives, or more than twice as much per capita of population.

POWERS PROHIBITED TO THE STATES

The scheme of the Constitution embraces not only a division of powers between the several States and the United States by delegation of certain specified powers to the latter, and a reservation of the others to the States, but it includes also the prohibition of certain powers to both. These powers, so far as they relate to persons, were deemed despotic in their nature, unjust in their operation, and contrary to the genius of free government; and hence, whilst prohibiting their exercise by the Federal Government, the States also surrendered them as a pledge of their fidelity to the great principles of republican liberty. Three of these powers related to the lives and liberties of persons, namely, bills of attainder, *ex post facto* laws, and the suspension of the great writ of habeas corpus; one to property, viz., laws impairing the obligation of contracts; and the other related only to the quality of persons in a free government, namely, the bestowing titles of nobility. These powers were refused to both. The power over contracts, however, was allowed to the Federal Government, indirectly, in its power over bankruptcy.

There were some other prohibitions to the States, but they were manifestly introduced for the purpose of preventing a conflict between State powers and Federal powers, which might, but for the prohibition, have been concurrent. In all these there is not a pretense for the claim of the Federal Government to intervene between a State and its citizens for the

protection and security of the great fundamental rights of persons and property and the pursuit and acquisition of happiness, all these being left to the care and protection of the States, except only in the four cases of habeas corpus, bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. Of all the civil rights of men, and all the rights of person and property, only these above named, and no more, are entitled to Federal protection in favor of a citizen against his State; and this protection extends only to the prevention of State action in violation of them, as will be shown more fully hereafter. And not one of these rights is secured against State action, even in favor of citizens of another State, except to this extent: That citizens of other States should have from each State the like protection that it affords to its own citizens.

THE FIRST EIGHT AMENDMENTS

What we have said covers in general terms a description of the powers delegated to the United States and of those which were reserved by the States, as they existed under the Constitution when it was framed. It will be noted that whilst the Constitution contained an express grant and a specific enumeration of the powers vested in the Government of the United States, and that it was understood on all sides that no others could be exercised, except only such auxiliary powers as are necessary and proper to carry the enumerated powers into execution, yet it was, out of abundant caution, deemed necessary to insert in the Constitution certain prohibitions on the Federal Government. These prohibitions were deemed necessary lest Congress should claim these prohibited powers as necessary and proper in carrying out the delegated and enumerated powers.

It will be seen that not one of the powers prohibited is of the nature of a substantive and independent power, to be exercised solely to attain some end outside of the enumerated powers,—some end which in itself and by itself was an object to be desired. But our forefathers had been familiar with bills or petitions of right in which certain great and fundamental rights were excepted out of the powers of government. It was complained that no such bill of rights was a part of the

Federal Constitution. So in the very first Congress assembled under the Constitution, composed largely of the great statesmen who had been members of the convention which framed the Constitution, and of members of the several State conventions which ratified it, certain amendments were proposed. All of them which were ratified, as has been firmly settled, have reference solely to limitations and restrictions on the powers of the United States, the design and intent of all of them being to prevent Congress in the exercise of its implied powers from passing any law of the kind prohibited in the amendments.

This view is fully sustained by Mr. Madison's great speech in the House of Representatives advocating these amendments. (See Annals of First Congress, p. 432.) All the propositions of amendment looking to a restriction on the power of the States, including one offered by Mr. Madison securing against State action religious liberty and freedom of the press and trial by jury, were rejected, thereby again affirming that all the great natural rights of man were to be left solely to the States for their definition and their security and protection.

RIGHTS SECURED AGAINST FEDERAL ACTION BY THESE AMENDMENTS

It will tend greatly to assist in understanding clearly and fully the nature of our system, and to mark the line clearly between State powers and duties on one hand, and Federal powers and duties on the other, if we note here in general terms the great and essential rights which were secured against Federal invasion by these amendments, and yet were left wholly at the mercy, the will, and discretion of each of the several States, fixing as they do, beyond controversy or dispute, the great underlying and fundamental principles of our system, that all civil rights, all rights of person and property, are left solely to the States.

These amendments, whilst leaving to the States unrestricted power, prohibited to the United States any power over, and guaranteed the following against Federal action:

Freedom in religious belief and worship; freedom of speech and of the press; the right of petition; the right to bear arms; security against the quartering of soldiers in the people's houses; security against unwarrantable searches and

seizures, against general warrant; security against trial for capital or infamous crimes unless on accusation by a grand jury; security against being put twice in jeopardy for the same offense; security against being compelled to be a witness against oneself; security against being deprived of life, liberty, and property without due process of law; security against the taking of private property for public use without just compensation; the right of trial by jury in civil and criminal cases; the right of the accused in criminal trials to be confronted with the witnesses against him, to have compulsory process for witnesses in his favor, and the assistance of counsel in his defense; security against the requirement of excessive bail, and the imposition of excessive fines, and the infliction of cruel and unusual punishment.

THESE GREAT RIGHTS ARE NOT PROTECTED AGAINST STATE ACTION

All these great rights are secured by the Constitution of the United States against Federal aggression only. So far as that Constitution and the powers of the Government established by it are concerned, these great rights are left for recognition, protection, and security to the States, which have sole and exclusive jurisdiction over them. They were then, and are now, in fact, protected against the action of the State governments and State agencies in all the States; but this protection and security came from provisions in the constitutions of each State, which the people of that State had of their own will ordained and established, and which that same people could alter and change at their pleasure, and thereby destroy the protection.

SURVEY OF THE WHOLE SCHEME

And now, if we will take a survey of the whole, we see that this grand scheme of free government for the security of the rights and promotion of the welfare and safety and advancement of the happiness of the people of the United States is, in short, this:

First. A common Government of all the States with exclusive jurisdiction and powers as regards foreign nations and

all intercourse with them; with jurisdiction over the relations between the States as States, and over commerce among the States and between them and foreign nations; over certain very limited powers whose influence and force ordinarily extend beyond State lines and could more conveniently be exercised by the common Government; over the securing to the citizens of each State, when in the jurisdiction of another State, the same great fundamental rights which the latter State grants to its own citizens; a denial to the States of certain despotic and arbitrary powers in respect to personal and private rights, which are incompatible with free institutions, and the denial to the common Government, in the exercise of its granted powers, the authority to invade certain great rights of private persons, as we have enumerated them; that all the powers of the common Government were "delegated" and enumerated and all other governmental powers, not prohibited, were "reserved" to or kept back by the States; that the States, —as they then existed, possessing all the power then reserved to them,—were essentially the basis of the Federal system, without which it could not have the beginning of life, nor any subsequent existence; that these States were equal in power and dignity, and this equality is the essence of the whole scheme; that each was adjudged to be capable of discharging its Federal functions and of exercising without control or restraint from any quarter its reserved powers.

Second. That in this great mass of reserved powers in the States were embraced not only the protection and security of all the rights of life, liberty, and property and the pursuit and acquisition of happiness but also the unrestricted power to define and determine what these rights are, their extent and limit, and all the processes of law for their vindication. And in this mass of reserved powers are also all jurisdiction over the conduct of men, the conservation of morals, and the preservation of the public health. That as to all these the reserved power of each State was and is absolute, without other restriction than it shall itself see proper to impose on its own government, so far as its own citizens are concerned, and the same rule prevails as far as concerned citizens of other States within its jurisdiction, except only that by the Federal Constitution it is so bound that the measure it metes to its own citizens the same shall be meted to them.

This outline of the matters embraced in the reserved powers of the States would ordinarily be sufficient; but in this day, when there exists so great a tendency to belittle and to obscure the powers, duties, dignity, and importance of the States, and to look to the Federal Government to rectify all wrongs, to remedy all evils, to supply prosperity and to check adversity, to bestow wealth and to remove poverty, and to these ends to invoke its powers over interstate commerce and its powers of internal and external taxation, in order to build up one interest at the expense of another, to break down one rival interest for the benefit of another, to take charge of sanitation and inspection in the States, to control all that pertains to the good order and morals of the people, to grant subsidies and bounties from the common treasury or the common property to advance private interests, it may be well to specify in detail some of these great powers of government which, under our constitutional system, are reserved exclusively to the States. This we will do at the risk of repeating in detail what has been stated in more general terms.

SOME OF THE GREAT POWERS RESERVED TO THE STATES

In this grand jurisdiction thus reserved to or kept by the States is the entire power over all contracts; who may make contracts, and who are incapable of making them from want of mature age, or of mental capacity, or of freedom of will; the form in which they must be made; the evidence to establish or defeat them; their nature and obligations; the consequences of default in complying with them, and the sole remedies to enforce them amongst citizens of the same State. The sole power over marriage; who can contract it; the forms to be observed in celebrating it; the relative rights, powers, and duties of husband and wife toward each other and in the community; the causes and manner of its dissolution, and all the relations and mutual duties and powers and rights of parent and child; and superadded is the institution of the family (the unit and basis of our civilization) with the right to acquire and hold against adverse fortune the homestead for its shelter and conservation. The titles and tenures to all property of every kind; the modes and forms of its acquisition and transfer; how the right to it may be lost by neglect or acquiescence

in wrong; what are injuries to it and the nature and extent of redress for such injury; by what rule it shall be enjoyed in life, and on the death of the owner how it shall descend and be distributed, and on what failure of blood it shall escheat to the State; the right to dispose of it by will, and by whom and in what forms wills must be made; whether entails or primogeniture shall be allowed, and to what extent property may be held in mortmain by corporations, and what rights, if any, corporations created in other States or in foreign nations shall enjoy in its jurisdiction; the civil status of all its people as to legitimacy or the contrary as affected by their birth, their education in youth, their civil rights, their qualification to vote and hold office, and their conduct in life, and their protection and security in life, liberty, property, and reputation; crimes against property, larceny, robbery, burglary, arson, malicious injuries and trespasses, cheats, embezzlements, forgeries, and the like; crimes against the person, assaults, batteries, mayhems, murder, seductions, false imprisonment, and all others; offenses against reputation and character, slander and libel; offenses against good order, good morals, and the health of the community; the great right of the free exercise of religious worship and freedom of religious belief and freedom of speech and of the press; all these and more of like character are solely within the jurisdiction and power of the States and depend on their laws and government for preservation and protection. In short, the State authority meets the child at his birth, attends him through infancy, manhood, and old age, and at his death, and is sufficient, if wisely exerted, to secure to him all the blessings which make life desirable in this world, and the opportunity of gaining for himself, in his free exercise of his religious belief, a blissful hereafter.

THE SUPREME COURT AFFIRMS THIS PRINCIPLE

The Supreme Court, in the Slaughter-House Cases (16 Wall. R., 76) referring to and quoting from the great judgment of Judge Washington in Corfield *v.* Coryell (4 Wash. C. C. R., 371), and speaking of the great and fundamental rights which are left by the Constitution under the sole guardianship and protection of the States, said they are comprehended under the following general heads:

"Protection by the Government, with the right to acquire and possess property of every kind, and pursue happiness and safety, subject, nevertheless, to such restraints as the Government shall prescribe for the general good of the whole."

And the same court, in the same case, referring to Ward *v.* Maryland (12 Wall., 430), say:

"This definition [above quoted from Judge Washington] was in the main adopted there, and it embraces *nearly every civil right for the establishment and protection of which organized government* is instituted. They are, in the language of Judge Washington, those rights which are fundamental, and they have always been held to be the class of rights which the State governments were created to establish and secure."

In the same case the court, treating of these same rights and exhibiting some impatience that a contrary opinion should be expressed, said:

"It would be the vainest show of learning to attempt to prove by citation of authority that up to the adoption of the recent amendments (Thirteenth, Fourteenth, and Fifteenth), no claim was set up that those rights depended on the Federal Government for their existence or protection beyond the very few express limitations which the Federal Constitution imposed on the States, such for instance as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of privileges of citizens of the States, as above defined, lay within the constitutional and legislative powers of the States *and without that of the Federal Government.*"

This is authority enough for this great and fundamental principle of the Constitution, which indeed is so patent and clear that the Supreme Court said it needed no authority for its support.

But this bill, sanctioned and recommended by the majority of the Committee on the Judiciary, attacks it,—denies it. We will, right here, add another authority, and hereafter many more to support the Constitution against the assaults made on it by the provisions of the bill we are now considering. The authority we now refer to is the judgment of the Supreme Court in United States *v.* Cruikshank (92 U. S. Rep., p. 554). That great tribunal, in denying the validity of the statute of

the United States providing for the punishment of a conspiracy to murder and imprison within a State, through Chief Justice Waite said:

"The rights of life and personal liberty are natural rights of man. To secure these rights, says the Declaration of Independence, 'Governments were established among men, deriving their just powers from the consent of the governed.' The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons in their jurisdiction in the enjoyment of these 'inalienable rights with which they are endowed by their Creator.' *Sovereignty for this purpose rests alone with the States.*"

It must be noted that both of these cases were decided after the adoption of the three recent amendments to the Constitution, and the last quotation was a judgment on the meaning of the Constitution as amended by them. But we will pursue that point no further now, our object being, in the regular and orderly discussion of this subject, to ascertain the meaning, force, and effect of the Constitution prior to the amendments, and then to note what changes they made in it.

DUTY COMES FROM POWER

We have seen what are the powers of the two Governments, State and Federal; it is easy now to see their duties. Power to protect and duty to protect are inseparable, the latter following and deriving its source from the former. For power we must look to the Constitution; when it is found, the duty is also found; but the duty never extends beyond the power. Said Chief Justice Waite, in the last case cited: "The duty of a government to afford protection is limited always by the power it possesses for that purpose."

THAT DUTY COMES FROM POWER REVERSED

So far our way is plain. There are no doubts, no chances for mistake. The line separating the powers and duties of the Federal Government from the powers and duties of the State governments is plainly marked, and it is plain that the power to pass this bill does not lie on the side of the Federal Government.

But in the course of time the great and essential rule for the interpretation of the powers of a government to which we have just adverted, and which received the sanction of the Supreme Court in the language we have just quoted, that the duties of a government were limited by its powers, was in some sections of our country being reversed and the powers of our common Government were derived not from the Constitution and its delegations of power; but men, looking at wrongs and evils, or supposed wrongs and evils, exclusively from the standpoint of their moral nature, their own conception of right and wrong, derived the power to act from what they thus concluded it was their moral duty to do. And in this way, and founded on these principles, there arose a party in this country, composed of men whose moral nature rebelled against all human wrong, and incited them to aggressive warfare for its removal, and who, in their zeal, were guided alone by their conviction that wrong, sin, "the sum of all villainies," was tolerated and protected in certain States of the Union in which African slavery existed. They did not stop to inquire whether the Federal Government had the power to interfere. They did not consult the Constitution for Federal power, and, finding it, then deduce the duty to interpose. To them the wrong was patent, their duty clear, and as a consequence the power existed.

THE CONSTITUTION BINDING IN ALL ITS PARTS

We shall not pursue the slavery agitation further. Suffice it to say that war came. It matters not for the purposes of this argument which side was right. The war ended, and as a consequence of it came the three amendments to the Constitution,—Thirteenth, Fourteenth, and Fifteenth. How they were placed there is wholly immaterial. They are there now as a part of the supreme law of the land. They are binding on all of us. Whether they were wisely or justly placed in the Constitution we shall not stop to inquire. Our inquiry is as to their meaning and force, and not into the methods of adoption. What we shall say in opposition to this bill we shall claim under the Constitution as thus amended; and in pleading as we now do for faith in compacts between the people of the States, for obedience to the Constitution in all its parts, and in its

every syllable and letter, in the original and in the amendments, we do not propose to disparage it in any respect whatever.

It is to us no "covenant with death," no "agreement with hell," but the supreme law of the land, and as such we obey it in all its parts. We know of no "higher law" for American Senators, or for American citizens, than the Constitution. We know of no duties of the Federal Government beyond the powers it confers, and we recognize as binding on us, in letter and spirit, every duty imposed by it on the Congress of the United States.

THE FORCE OF THE THIRTEENTH, FOURTEENTH, AND FIFTEENTH AMENDMENTS

We have now seen what was the nature of our system of government, and what were the relative powers and duties of the Federal and State governments under the Constitution, as it existed before the three amendments were adopted; and we have seen that under it, as it then existed, there was no power to pass this bill. We inquire now whether the needed power has been conferred by these amendments. The task will be easy, since from this point our way is marked out clearly by judicial decision. We shall do little more than refer to, quote from, and apply these decisions.

THE SLAUGHTER-HOUSE CASES

Happily for the country, the first case in which the construction and meaning of these amendments came before the Supreme Court was one in which Southern white men were seeking redress against one of those pernicious statutes, then common in the Southern States, by which those possessed of the State governments were making traffic and merchandise of their powers for the purpose of enriching themselves and their friends, namely, the Slaughter-House Cases (in 16 Wall. R.). There was nothing in these cases to excite alarm or prejudice, so far as the colored race was concerned, and nothing to prevent a calm and careful consideration of the amendments. It is remarkable, too, that a Southern States' rights jurist of unequaled powers and great purity of character appeared before the court, pressing for a construction of the amendments,

which, if adopted, would have been the fatal precedent upon which could have been built, and would have been built, a system of legislation which would have left, in the Southern States at least, no other control over their internal affairs than it should please Congress to give them. It is remarkable, too, that this construction was concurred in by the two Democrats who then held seats on the Supreme bench, and that the narrower, yet the plainly true, construction of the Constitution was upheld by Republican judges only, and vindicated in an opinion of unsurpassed ability.

In this opinion the great judge who drew it up, referring to the tendency created by the war in favor of more enlarged powers of the Federal Government, thought it necessary to say:

"But however pervading this sentiment, and however it may have contributed to the adoption of the amendments, we do not see in those amendments any purpose to destroy the main features of the general system. Under the pressure of all the excited feeling growing out of the war, our statesmen have still believed that the existence of States, *with powers for domestic and local government, including the regulation of civil rights, the rights of person and property,* was essential to the perfect working of our complex form of government, though they have thought proper to impose additional limitations upon the States, and to confer additional powers on that of the nation."

The Fourteenth Amendment provides, among other things, that "no State shall make or enforce any *law* which shall abridge the privileges and immunities of the citizens of the United States." And the main effort in that case by the appellants was to bring within the scope of the Federal Government jurisdiction to protect citizens against the exercise by a State legislature of a power to grant to a corporation an unjust and odious monopoly of the business of slaughtering live stock for food, and of receiving at their landing all live stock shipped to the parishes in which the city of New Orleans is situated,—a territory embracing 1,154 square miles. It was urged in their behalf that this law deprived over 1,000 persons of the right to follow their vocation as butchers,—a right which they had as citizens of the United States.

The court, however, denied this claim, holding that there

were two citizenships in our system,—one of the United States, and one of the State in which a citizen of the United States resides; that these two citizenships pertain to all citizens of the United States, who were also residents of any State; that the rights, privileges, and immunities of such a person as a citizen of the United States were separate and distinct from his rights, privileges, and immunities as a citizen of a State; that protection of the former alone was committed to the Federal Government, and of the latter to the State Government; that each citizen of a State owed a double allegiance, namely, to the Federal Government, and to the State in which he resided; that he looked to the one for the security and protection of a part of these rights, and to the other for protection in all the others; that both governments were parts of a complete whole, and both necessary to the protection and security of the citizen in all his rights, privileges, and immunities.

The court then proceeds to enumerate the rights which pertain to a citizen in his character of citizen of the United States, and which we will here reproduce, so that by considering the actual examples a clearer insight may be had into their nature than could come from definition and description only.

RIGHTS OF CITIZENS OF THE UNITED STATES ENUMERATED

They are as follows:

The right to come to the seat of Government to assert any claim he may have upon that Government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions.

The right of free access to its seaports, through which all operations of foreign commerce are conducted; to the subtreasuries, land offices, and courts of justice in the several States.

The right to demand the care and protection of the Federal Government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign Government.

The right to peaceably assemble and petition (Congress) for a redress of grievances, and to the writ of habeas corpus.

The right to use the navigable waters of the United States however they may penetrate the territory of the several States.

All rights secured to citizens by treaties with foreign nations.

The right to become a citizen of a State by residing in it.

Then proceeds the court:

"There are rights which pertain to a citizen in his character of citizen of the United States, and are therefore subject to Federal jurisdiction and power, which grow out of prohibitions in the Constitution of the United States on State action; of such is the right to be absolved from all the consequences of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts enacted by the States; and the right secured against prohibited State actions, as expressed in the three new amendments to the Constitution."

The court, on these principles, refused to give relief against the legislation of the State of Louisiana complained of.

EFFECT OF THE GREAT JUDGMENT IN THE SLAUGHTER-HOUSE CASES

This great judgment was the first beacon light that flashed across the gloom and darkness of constitutional exposition produced by the events of the war. It recalled the great principles on which the Constitution was based, and pointed out the path of safety to be pursued. It is so clear in its argument, so convincing in its reasoning, that men wonder on reading it how they ever entertained any doubt about the true meaning of the Constitution as affected by the amendments.

POWER CONFERRED BY THE AMENDMENTS RELATES ONLY TO STATE ACTION

This case was followed by others, in which the principles announced in the Slaughter-House Cases were followed to their logical conclusion in strict accord with the terms of these amendments. So far as the present argument is concerned it is only necessary to say that the power conferred on the Federal Government by these amendments was held to be the only power to enforce the prohibitions on State actions contained in them.

These amendments, so far as they relate to the questions now involved, consisted wholly of negations,—prohibitions *always* on State action and *sometimes* on Federal action.

The language of the Fourteenth Amendment is as follows:

"No State shall make or enforce *any law* which shall abridge the privilege and immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

And the Fifteenth Amendment ordains as follows:

"The right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any State on account of race, color, or previous condition of servitude."

It is now firmly settled that these provisions are directed solely against State laws and State action, through persons or agents clothed with State authority. It is also settled that the power conferred on Congress to enforce these provisions is a power only to enforce the prohibition against State action. That the rights conferred on persons under them are not positive, original rights, but the right only to exemption from, and protection against, the prohibited State action. And the power of Congress to interfere in any case is purely a power of correction, a power to give redress against a prohibited State action, that the exercise, the actual exercise of efficient power by Congress, under the amendments, presupposes State action of the kind prohibited; and until there be such prohibited State action, the power of Congress is wholly dormant, and without such action really being taken, somewhere or at some time, the power of Congress would sleep forever.

In no case under these amendments, so far as the present controversy is concerned, can the power of Congress be made to reach, for punishment or for correction, or for redress in any way, civil or criminal, the acts of private individuals. On this last point the controversy was long between a sectional majority in Congress and the Constitution, but in the end the Constitution triumphed fully, completely. It would be interesting to trace the progress of the decisions of the court from the first to the last case in evolving, as the facts of each case warranted, the true meaning of these amendments. To do this would detain us too long. But it is well here to quote some of the expressions of the judgments in these cases, showing truths of a fundamental character.

QUOTATIONS FROM THE SUPREME COURT

United States *v.* Cruikshank

Chief Justice Waite, in delivering the opinion of the Supreme Court in United States *v.* Cruikshank (92 U. S., p. 555), speaking of the provisions in the Fourteenth Amendment prohibiting the States from denying to any persons within their jurisdiction "the equal protection of the laws," said:

"This provision does not, any more than the one which precedes it, and which we have just considered (namely, the provision prohibiting a State from depriving any person of life, liberty, or property, without due process of law), add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism; every republican Government is in duty bound to protect its citizens in the enjoyment of this principle, *if within its power. That duty was originally assumed by the States, and it still remains there.* The only obligation resting upon the United States is to see that the States do not deny the right. The amendment (the Fourteenth) guarantees this, but no more. The power of the National Government is limited to the enforcement of the guarantee."

And on this ground the Supreme Court in that case held that the United States had no power to punish a conspiracy to commit murder, or to falsely imprison a citizen, and none to punish false imprisonment or murder itself. This case was decided in 1875, and was the logical outcome of the principles announced in the Slaughter-House Cases, decided in 1872, and Bartemeyer *v.* Iowa, 18 Wallace, 130; Miner *v.* Happersett, 21 Wallace, 162; United States *v.* Reese, 92 U. S., also decided in 1875.

In the same line was the decision in Strauder *v.* West Virginia, decided in 1879.

Virginia *v.* Rives

At the same term was decided Virginia *v.* Rives (100 U. S. R., 313), in which the Supreme Court remanded to the State court a criminal case which had been removed to the Federal court upon the ground that the subordinate State offi-

cers, in violation of the law of the State, had discriminated against the accused, who was a colored man, in declining to summon on the grand jury which indicted, and on the panel which was to try him, any person of his race. Justice Strong, speaking for the court, and quoting all the provisions of the first section of the Fourteenth Amendment (except the first clause, which defined citizenship), said:

"They all have reference to State action *exclusively,* and not to any action of private individuals. It is the *State* which is prohibited from denying to any person under its jurisdiction the equal protection of the laws, and hence the statute above referred to (sections 1777 and 1778 of the Revised Statutes) is intended for protection against State infringement of those rights."

Ex Parte Virginia and Neal *v.* Delaware

At the same term of the court was decided the case of *Ex parte* Virginia (100 U. S.). In this case the Supreme Court affirmed the constitutionality of an act of Congress punishing a subordinate State officer, acting as such, and exercising a State power, conferred on him by State laws, for denying to a colored man the equal protection of the laws, but the court reaffirmed, in the most explicit language, the doctrine that the first section of the Fourteenth Amendment referred alone to State action. On this point the court repeated:

"The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions on *State* power. It is these (restrictions on State power) which Congress is authorized to enforce, and to enforce against State action."

The court further held that this power of Congress to enforce the prohibitions and restrictions on State action extended to all kinds of State action, "however put forth, whether that action be executive, legislative, or judicial," and therefore it was in the power of Congress to punish State ministerial officers who, clothed with State power, exercise that *power* in violation of these prohibitions on State action. On this point the court used this language:

"Whoever, *by virtue of public position under a State government,* deprives another of life, liberty, or property, with-

out due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibitions, and, as he acts in the name *of and for the State,* and is clothed with the State's power, his act is that of the State."

Neal *v.* Delaware, 103 U. S., 370, decided in 1880, follows in the same line.

Up to this point it seems clear enough, in fact, beyond controversy, that the power conferred on Congress by the amendments did not extend to dealing with private persons for their individual acts, in contravention of the rights which followed from the prohibitions in the amendments. But so tenacious is usurped power of its unjust and unconstitutional prerogatives; so strong the sentiment that power comes from supposed or assumed moral duties, and not duties from power granted by the Constitution; so long had the Southern States suffered, without successful resistance, from unconstitutional dominance in their domestic and internal affairs, reserved to them by the Constitution; that the devilish spirit of intermeddling would not down at these repeated decisions of the Supreme Court. This spirit takes possession of even men of good intentions, if they have associated with it an intense egoism and strong convictions of their own superior personal purity and wisdom, and a distrust of the virtue and capacity of others, and it arrogates to itself the guardianship and control of the world. So it became necessary for the Supreme Court to make another decision, reaffirming again and enforcing the true principles of the Constitution, as they had been announced in their former judgments.

United States *v.* Harris

In 1882 the case of United States *v.* Harris, 106 U. S., p. 629, was decided. That case was an indictment under section 5519, Revised Statutes, which was in the following words:

"If two or more in any State or Territory conspire, and go in disguise upon the highways or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving to

all persons within such State or Territory the equal protection of the laws, each of said persons shall be punished by a fine, and so forth."

The indictment charged certain private citizens of Tennessee with taking certain other citizens of the State from the custody of the sheriff who held them for trial on a criminal charge, and with beating, wounding, and maltreating them, and killing one of them, and thereby depriving them of an equal protection of the laws of the State. The Supreme Court, as if wearied by the compulsory reiteration of principles already well settled, delivered a very elaborate and learned opinion, drawn up by Justice Woods, and again confirmed the true construction of the Constitution already fixed by the preceding cases. The court deemed it necessary again to enforce the old maxim of constitutional construction, by quoting from Judge Story that which, up to the war, had never been doubted as a fundamental canon of constitutional law, thus:

"Whenever, therefore, a question concerning the constitutionality of a particular power arises, the first question is, whether the power be expressed in the Constitution? If it be, the question is decided. If it be not expressed, the next inquiry would be whether it be properly incident to an express power and necessary to its execution, &c. (Story on the Constitution, sec. 1243.)"

The court then, proceeding on this canon of construction, quote and discuss all the various provisions of the Constitution on which this legislation (section 5510) and the indictment founded on it could possibly have been based, namely, the Thirteenth, Fourteenth, and Fifteenth amendments, and Section 2, Article 4, which we have before noticed as guaranteeing to the citizens of the several States the privileges of citizens in each State, and find that none of them is a warrant for this legislation. Referring to the first section of the Fourteenth Amendment (hereinbefore noted as containing the prohibitions to the States), and to the fifth (giving power to Congress to enforce them), the learned judge quotes from the Slaughter-House Cases as follows:

"If the States do not conform their laws to its requirements (of the Fourteenth Amendment), then, by the fifth section of the article of amendment, Congress is authorized to enforce it by suitable legislation."

And he quotes and adopts the following expressive language of Mr. Justice Bradley in the Cruikshank Case when it was tried in the circuit court (1 Woods, 308):

"It (the Fourteenth Amendment) is a guarantee against the acts of the State government itself. It is a guarantee against the exercise of arbitrary and unconstitutional power on the part of the government and legislation of the State, not a guarantee against the commission of individual offenses; and the power of Congress, whether express or implied, to legislate for the enforcement of such a guarantee, does not extend to the passage of laws for the *suppression of crime within the States.* The enforcement of the guarantee does not require or authorize Congress to perform the duty that the guarantee itself supposes it to be the duty of the State to perform."

And, quoting from the same case when in the Supreme Court, he again announced the doctrine that "the obligation resting upon the United States is to see that the *States* do not deny the right. This the amendment guarantees, and *no more.* The power of the National Government *is limited to this guarantee.*" And he also repeated what was said in Virginia *v.* Rives, "that these provisions of the Fourteenth Amendment had reference to State action *exclusively.*"

And having shown that the Fourteenth Amendment did not warrant the legislation, the court continues, in the following unanswerable argument, to show that these amendments and the rights secured by them cannot be violated by private persons, and hence Congressional action under these amendments cannot be directed against nor operate upon private persons:

"A private person cannot make constitutions or laws, nor can he with authority construe them, nor can he administer or execute them. The only way, therefore, one private person can deprive another of the equal protection of the laws is by the commission of some offense against the laws which protect the rights of persons, as by theft, burglary, arson, libel, assault, or murder. If, therefore, we hold that section 5519 (before quoted) is warranted by the Thirteenth Amendment, we should, by virtue of that amendment, accord to Congress the power to punish every crime by which the right of any person to life, liberty, property, or reputation is invaded. Thus, under a provision of the Constitution which simply abolished slavery and involuntary servitude, we should, with few ex-

ceptions, invest Congress with power over the whole catalogue of crimes. A construction of the Thirteenth Amendment which leads to such a result is therefore unsound."

THESE DECISIONS SETTLED THE MEANING OF THE CONSTITUTION

This last decision would seem to close the door against all controversy as to the meaning of the three amendments and the powers of Congress under them. It, in connection with the preceding decisions of the Supreme Court, did settle, if anything can be settled in American Constitutional law, that the power and consequent duty of protecting life, liberty, and property, all personal and property rights, the power to punish all invasions of them, all offenses against persons and property, remained exclusively with the States; that so far as power was conferred by the Constitution on the United States to interpose in these matters it was solely a power to *prevent* or correct State action of the kind prohibited, namely, State action depriving a person of life, liberty, or property without due process of law; that is, without due process of State law, not of Federal law, but of State law; and denying to any person the equal protection of the laws, of the State laws, for there were no other laws which could protect them; and that so far as Congress had the right under the clauses conferring jurisdiction to enforce the amendments, to pass laws to operate directly or indirectly, it was a power to restrain and correct State action, performed by State officers and agents clothed with State authority, and to punish such officers and agents for their official and public action done in the name and by the authority of the State, and did not reach the acts and conduct of private individuals.

THE CIVIL RIGHTS LAW AND ITS PROMOTERS

But the spirit of aggression on State authority, where that aggression would operate efficiently and offensively on the Southern States, the temper to intermeddle with the concerns of others, and to badger and insult them not only in that which related to their public conduct but also in their private and social relations, would not acquiesce in the defeat thus re-

ceived at the hands of that august tribunal. In the year 1875 a law was enacted to enforce in public places, theaters, inns, and railroad cars, and on steamboats, a social equality between the two races.

The law was not obeyed anywhere. The colored people of the South in the main did not approve it; they were not inclined to force an association for which neither race felt any desire; they were content to leave to time, to the regular working of social forces, the regulation of social intercourse and social duties. Yet here and there all over the country were found those of that race,—few indeed,—mostly of mixed blood, who took advantage of the provisions of the statute. From this it resulted that, in some instances, criminal prosecutions were commenced under the statute, and civil suits for damages instituted for a violation of its provisions.

THE CIVIL RIGHTS CASES

Both classes of these came before the Supreme Court in December, 1883, and are reported under the name of "Civil Rights Cases," in 109 U. S. R., p. 3. The statute under which these cases arose was passed March 1, 1875, sec. 18 Stat., p. 335, and is as follows:

"SECTION 1. That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations and advantages, facilities and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement, subject only to the conditions and limitations established by law and applicable alike to citizens of every race and color, regardless of any previous condition of servitude."

Section 2 provided penalties and punishments for any person violating the first section.

The statute was adjudged unconstitutional; this result was reached by an opinion drawn up by Mr. Justice Bradley, distinguished for the clearest analysis, the most unanswerable reasoning.

Time will not allow us to set out the substance of the argument of this great judgment; we can only quote from it a few short extracts, which are most directly pertinent to the question before us. The court quoted from and confirmed the

cases which had been decided, holding that the Fourteenth Amendment applied to State action alone; explained the Fourteenth and Fifteenth Amendments; and, in reference to the jurisdiction of Congress to exercise direct and positive power, in contradistinction to power merely corrective of prohibited State action, among other things said:

"It is State action of a peculiar character that is prohibited; individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation and State action of every kind which impairs the privileges and immunities of citizens of the United States, or which deprives them of life, liberty, or property without due process of law, or which denies to them the equal protection of the laws."

And speaking of the fifth section, which gives Congress the power to enforce this, the court continues:

"To enforce what? To adopt appropriate legislation for correcting the effect of such prohibited State laws and State action, and thus to render them effectually void and inoperative; this is the legislative power conferred on Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation, but to provide against State legislation and State action of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of State laws and the action of State officers, executive and judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment, but they are secured by way of prohibition against State laws and State proceedings opposing these rights and privileges, and by power given to Congress to legislate for carrying such prohibition into effect; and such legislation by Congress must necessarily be predicated upon such supposed State laws and State proceedings and be directed to the correction of their operation and effect."

This is clear enough, but the court emphasized the decision again in this extract:

"Until some State law has been passed, or some State action, through its officers or agents, been taken adverse to the

rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under said amendment, can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority."

And, again, the court, in denying the power of Congress, under these amendments, to legislate on the subject of the violation by private persons of rights secured by them, use this language:

"Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings; the wrongful acts of an individual unsupported by any State authority are simply a personal wrong, or a crime of that individual, an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by a resort to the laws of the State for redress. An individual cannot deprive a man of his right to vote, to hold property, to buy or sell, to sue in the courts, to be a witness or a juror; he may by force or fraud interfere with the right in a particular case; he may commit an assault against the person or commit murder, or use ruffian violence at the polls, or slander the good name of a fellow-citizen; but unless protected in these wrongful acts by some shield of State law or State authority, he cannot destroy or injure the right; he will only render himself amenable to satisfaction or punishment, and amenable therefor to the laws of the State where the wrongful acts are committed.

"When the Constitution seeks to protect rights against the discriminative and unjust laws of a State by prohibiting such laws, it is not individual offenses but abrogation and denial of rights which it denounces and for which it clothes Congress with power to provide a remedy. The abrogation or denial of rights for which the States alone were, or could be responsible, was the *great seminal and fundamental wrong which was intended to be remedied;* and the remedy to be provided must be predicated upon that wrong. It must assume that in the cases provided for, the evil of the wrong actually committed rests

upon State law or State authority for its exercise or perpetration."

COMMENTS ON THESE CASES

This closes what we have to say on the subject of judicial exposition by the Supreme Court of the powers of Congress, so far as they relate to the subject-matter of this bill. These cases prove beyond controversy that Congress has no direct power or jurisdiction over the main points in the bill. Congress can pass no law upon the subjects of personal conflicts between private individuals of different races and personal wrongs perpetrated by one on the other; or between persons of different political parties; or wrongs done by one party man on another because of opinions which the injured party may entertain or express. We suppose this much is conceded by the authors of the bill, or else they would have provided directly for the redress of the wrongs and the punishment of the offenders.

The authors of this bill have not been backward in asserting power in Congress over subjects cognate to those mentioned in this bill. Independent of any support which they may have given to the many acts of Congress which may have been decided unconstitutional by the Supreme Court in the cases we have referred to (and about which we have made no inquiry and therefore make no assertion), they have introduced bills in this body, contemporaneously with the decisions in the "Civil Rights Cases," which contained assertions of the extremest power over these subjects. One of these, introduced by the learned chairman of the Judiciary Committee (the Senator from Vermont) on the 4th of December, 1883, and reported back from the committee by the Senator from Massachusetts (Mr. Hoar) on July 20, 1884, indicates no want of faith in the unlimited power of Congress to legislate wherever colored people are concerned; yet this bill was never called up for action, and now sleeps the sleep of death. Whether it was abandoned from a change in the views of its authors as to its constitutionality or not, we are unable to say.

Certainly it was a very extraordinary bill in all its provisions. Its main object was to withdraw from the consideration of the State courts all cases in which was litigated any right for the settlement of which it was necessary to pass upon

the race or color or previous condition of servitude of any person whatever. It further contained the degrading provision that authorized a citizen of the State in which the court sat to stop a trial in which he was a party, and, of his own mere will, to remove it to a Federal court if he should be dissatisfied with a decision of any point made against him. A power so degrading to a court was never allowed in a free country to a mere suitor. Long years ago in England the writ of prohibition issuing from a superior court to an inferior was sometimes delivered to the inferior court during the trial, though it was always issued before; and by this proceeding a trial already commenced was stopped and removed to another court. But this was condemned by the English Parliament in the reign of Queen Elizabeth, three hundred years ago; it was driven in disgrace from practice, and has so remained ever since.

It was left to the bill to which we have already referred to make the attempt for the first time to introduce the practice here, with the superadded wrong of leaving it to the discretion of a party in court to menace and insult the judge by an immediate removal of the case if he should dare to decide a question against him.

BILL UNCONSTITUTIONAL FOR A MERE INQUEST

It is no defense to the constitutionality of this bill that it assumes no jurisdiction, no power over persons to punish or restrain them; but simply directs the court to make an inquest or inquisition concerning crimes committed in a State, and whose trial and punishment are solely in that jurisdiction. The question for our decision is, have we the power to pass the bill; not whether the bill proposes nothing of effective force; not whether it be a mere impotent abortion, neither securing rights nor preventing wrongs.

It is no excuse in a constitutional point of view, even if it be true, that the bill does not invade *effectively* the domain of the reserved rights of the States, or is wholly innocuous from mere impotency and want of vigor. We must look to the Constitution for the power. It is certain the power to pass this bill is not among the express powers of the Constitution. No one pretends that. If it be claimed as an incidental power,

then its advocates must point out the express power or powers for carrying out which this bill is necessary and proper or appropriate. This cannot be done. We challenge them to do this. Besides, mere impotency,—mere inutility,—condemns it as an incidental power, for only implied powers are granted by the Constitution, which are useful and effective, or, in constitutional language, "necessary and proper for *carrying into execution*" the powers expressly granted. So if it be ineffective and useless, for that reason alone it is unconstitutional. But conceding it to have force, as it has, the inquisition proposed in it, so far as it relates to injuries by private individuals, to persons and property (and that is the whole of it), is an inquisition into the conduct of persons, into crimes and offenses exclusively within the jurisdiction of the State. Whatever may be the information obtained by it, however calumnious and unjust to private citizens, to whom it gives no opportunity of defense, it cannot be made the basis of Federal action in the matters which constitute its soul and spirit.

POWER TO INQUIRE LIMITED BY THE JURISDICTION OVER THE SUBJECT

It was settled at an early day by the action of no less an authority than that of George Washington, that the jurisdiction of the legislative branch of the Government to make official inquiry, under the sanction and force of law, was limited by its power to act on the subject-matter concerning which the inquiry was made. The Senate will remember that on March 12 last the Senator from West Virginia, in the debate on the relations between the President and this body, produced a message from George Washington, in which he declined to furnish certain information at the request of the House of Representatives upon the express ground that the House had no power over the subject to which the information related. In that message General Washington stated the grounds of his refusal in these words:

"As, therefore, it is perfectly clear to my [his] understanding that the assent of the House of Representatives is not necessary to the validity of a treaty, and as the treaty with Great Britain exhibits in itself all the objects requiring legislative provision, and on these the papers called for throw no

light, and as it is essential to the administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved—"

And is it not equally as important that the boundaries fixed by the Constitution between the Federal and State governments should be preserved? But we proceed with the quotation—

"a just regard to the Constitution and to the duties of my office, under all the circumstances of this case, forbid a compliance with your request."

What the Constitution forbids to be answered, it equally forbids to be asked; what it forbids to be asked, it forbids shall be obtained by force and through irresponsible power.

THE BILL IS NOT IMPOTENT AND HARMLESS

But the bill is not even entitled to the defense of being entirely impotent and harmless. Impotent it is for all the purposes of good and orderly government, but it has extraordinary vigor for evil. It establishes an unwarranted Federal espionage over matters confided exclusively to the jurisdiction of the States; it invites and encourages irresponsible and discontented persons to subject the conduct of their neighbors, their fellow-citizens, to an investigation and scrutiny by a tribunal before which these persons, thus slandered, thus maliciously accused, have no opportunity of appearing, either by themselves or by counsel, or of summoning witnesses, or cross-examining those who speak against them. It is true the tribunal has no power to render judgment against them which will affect their lives, their liberty, or their property, but it has the power in an *ex parte,* inquisitorial way, of giving official form and body and substance to accusations which there has been no opportunity to meet, to destroy character and to blacken the names of citizens who are not heard in their own defense; to stamp as genuine and true slanders and libels; to give currency to blackguardism and perjury. It is true it accomplishes nothing in the way of enactments against personal rights, but, like a thief, it stealthily surveys the ground of future operations, with the view of taking advantage of a more favorable opportunity for outrage and wrong.

Considering the tendency of this bill, its usurpation of a

jurisdiction over private and personal rights, reserved to the States for their security and protection; considering also its capacity as a vehicle of calumny and slander, and its tendency to destroy the respect and confidence of the people in constitutional guarantees and official justice, it may be well to denounce it as no common or insignificant violation of the Constitution.

It destroys the whole scheme of the Constitution; it does not enter the vestibule merely and deface or destroy some slight ornament, but it saps and undermines the foundations of the temple itself.

THE BILL UNCONSTITUTIONAL IN ITS MEANS AS WELL AS IN ITS ENDS

But the bill is still further objectionable, in that it seeks to attain *unconstitutional ends* by *unconstitutional means*. It was probably fit that this work of espionage, this inquisition into the conduct of persons over whom we have no jurisdiction, this usurped function to try citizens in their absence, to condemn without hearing, to circulate and give support to slander and calumny, should be prosecuted by a perversion to the work of injustice and wrong of the powers of that department which was more especially dedicated by the Constitution to the administration of right and justice. It would be a terrible but just retribution for our infidelity to the Constitution, if that great charter, for mere party advantage, is to be destroyed, the rights of the States to be subverted, the rights of citizens to be trodden down, that the instrument selected for these wicked ends should be that especial organism in our system to whose virtue and intelligence were committed the protection and preservation of all these which this bill appoints it to destroy.

THE POWER CONFERRED ON THE COURTS IS NOT JUDICIAL

The power committed by this bill to the circuit courts is not a judicial power of the United States, *and none but judicial power can be vested in a court of the United States.*

The Constitution declares:

"The judicial power of the United States shall be vested

in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

The Constitution in another place authorizes Congress to confer the power of appointing certain inferior officers on the courts of the United States. Beyond this there is no power to confer on any court of the United States any power but judicial power, nor any judicial power but judicial power of the United States. That power is defined in the Constitution itself, and, so far as it can have any possible relation to this bill, is embraced in the following words:

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

It must be noted that the language used is "cases," not "questions," arising under the Constitution and laws of the United States. The distinction between "questions" and "cases" is important and well settled. The jurisdiction is in "cases." A case arises only when some question respecting the Constitution and laws "shall assume such form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it *by a party who asserts his rights* in the form prescribed by law," said Chief Justice Marshall in Osborn *v.* United States Bank, 9 Wheat., p. 819.

The same great judge in his argument in the Jonathan Robbins case in the House of Representatives in March, 1800, made this matter still more plain. Referring to certain resolutions then before the House, in which it was declared that the judicial power extended to all "questions" arising under the Constitution and laws and treaties, he called attention to the fact that the Constitution used the word "cases," not "questions"; and he then said:

"The difference between the Constitution and the resolutions was material and apparent. A 'case in law or equity' was a term well understood and of limited signification; it was a controversy between parties which had taken a shape for judicial decision. . . . By extending this judicial power to all cases in law and equity the Constitution had never been understood to confer on that department any political power whatever. To come under this exception a question must

assume a form for forensic litigation and judicial decision. There must be parties to come into court who can be reached by its process and bound by its powers; whose rights admit of ultimate decision by a tribunal to which they are bound to submit. (See Annals of Sixth Congress, p. 606.)"

It is clear that this bill is unconstitutional, for not only is there no "case" in which a court can act, but there is not even a "question" arising under the Constitution, or any law or treaty of the United States. The questions are such only as a party majority may ask, and they concern only the conduct of parties which may be supposed to violate some laws of a State, over which the Federal Government has no jurisdiction whatever. Not only does the jurisdiction fail, because there is no case before the court of any kind arising out of a Federal or State law, but because the power conferred by the bill on the circuit courts is not of itself judicial in any sense whatever. Keeping in mind what has already been quoted from Chief Justice Marshall, let us consider some authorities which treat of judicial power, in its essence and nature, whenever and wherever it is exerted.

In Shultz *v.* McPheters (79 Ind. R., p. 378), the supreme court of that State say:

"It is the inherent authority not only to decide, but to make *binding orders and judgments,* which constitutes judicial power."

And the supreme court of Michigan, in Underwood *v.* McDuffie (15 Michigan R., 368), said:

"The judicial power, even when used in the widest and least accurate sense, involves the power to hear and determine the matters to be disposed of; and this can only be done by some order or judgment *which needs no additional sanction to entitle it to be enforced."*

And the court proceeds to condemn *in totidem verbis* the things which this bill authorizes and requires to be done. Say the court:

"No action, which is merely preparatory to an order or judgment to be rendered by some other body, can be properly termed judicial."

A learned commentator on the Constitution, discussing this subject, says:

"In order to make a case for judicial action, there must be

parties to come into court, who can be reached by its process and bound by its powers,—parties whose rights admit *of ultimate decision by a tribunal to which they are bound to submit; and also that the question to be acted on should be capable of final determination in the judicial department of the Government, without revision or control of either the Executive or Legislature.* (Curtis's Com., p. 96.)"

And another learned commentator says:

"The kind of authority that is judicial in its nature relates to and acts on rights of person and property not created by this authority, but under existing law. This authority, 'in specific controversies' between parties, determines these rights as they exist, and does so at the instance of a party. These qualities distinguish judicial power from what is simply executive or legislative. (Spear on Const., p. 3.)"

Tested by these rules, there can be no doubt that the power attempted to be conferred by this bill on the circuit courts is not of the kind which they are authorized to receive, namely, judicial power. This bill provides only for the summoning of witnesses at the instance of persons claiming no rights and seeking redress for no wrongs, and then for examining them concerning the circumstances of an alleged homicide or serious injury to person or property, whether consummated or only threatened.

There is no controversy before the court for its determination; there are no parties over whom it has power; or who, on the one hand, ask for a recovery of rights, or who, on the other, deny or contest rights demanded against them. The court hears nothing, deliberates on nothing, determines nothing; it renders no judgment, it restores or redresses no right and remedies no wrong. The court only hears evidence concerning a matter over which it has no jurisdiction and reports to another department its conclusions as to facts about which the court itself has no right to form a judgment. The sole power of the court is to report to the President its opinion as to the existence of certain facts which it is alleged are criminal by the laws of the State in which they transpired. The sole function of the court is to act as a detective for the Executive, to enter into a sovereign State to inquire into the conduct of its citizens, and to gather from common informers, in some instances, their impressions or beliefs, but in others their

calumnies and slanders. These witnesses are not to be confronted by the persons whom they accuse, nor to be cross-examined to test either their accuracy or their sincerity.

That is all of it.

ONLY JUDICIAL POWER CAN BE CONFERRED ON COURTS OF THE UNITED STATES

It is not a new or doubtful question as to the power of Congress to confer on any of the constitutional courts of the United States,—the Supreme Court, the circuit court, or the district court,—any authority or function not judicial. The question arose early during the administration of General Washington, under an act of Congress authorizing the circuit courts to inquire into the justice of certain claims for pensions. All the Supreme judges acting on the circuit (except Mr. Justice Johnson, and as to him there is no information) held the act unconstitutional upon the ground that the power was not judicial, inasmuch as the adjudication was not to be final, but was to be reported to the Secretary of the Treasury. Some of the judges, however, concluded they would,—acting as commissioners and not as judges in court,—perform the duty assigned to them under the act. Congress and the President being informed of the opinion of the judges, the act was repealed, saving in the repeal, however, all rights to pensions founded on "any legal adjudication."

A case, during the next year, came up in the Supreme Court, in which the validity of an adjudication made by the judges, as commissioners, was the only point involved, and that court unanimously held that the act conferring the power on the circuit courts was unconstitutional, and that, as the power was conferred on the courts, it could not be exercised by the Judges as commissioners. (See Hayburn's case, 2 Dall.)

In the bill before us, it must be noticed that the power is conferred on the circuit court, not on the circuit judge. This was done *ex industria* by the Judiciary Committee, for the bill as originally introduced conferred the power on the judge, and by the Judiciary Committee it was amended as it now appears. The change was made for the purpose, as it was stated, of having a court rather than a mere judge, so that

the laws empowering courts to use compulsory process for the attendance of witnesses and punishing them for contumacy might apply.

But if the bill should be amended so as to stand as it originally was, to give this power to the judge acting as a commissioner merely, it would still be liable to the objection of being unconstitutional, notwithstanding the judge might himself waive his objections and consent to act. In that case the bill would mean that every judge of a circuit court in the United States should be thereby appointed a commissioner to discharge the duties mentioned in the Act. This would be an appointment to office by Congress, and not, as the Constitution requires, by the President by and with the advice and consent of the Senate. This view received the express sanction of the Supreme Court in United States *v.* Ferreira (13 Howard, 40).

In that case Chief Justice Taney, in a very able and learned opinion, reviewed this whole subject. A law of Congress had committed to the district judge for the district of Florida the power and duty of examining certain claims against the United States for losses sustained by certain Spanish citizens. This law was passed in pursuance of a treaty with Spain. That judge, after examining the witnesses for and against each claim, was required to make his decision and report it to the Secretary of the Treasury, who, on being satisfied that the claim was right and just, was to pay it. On an appeal from a decision so made by the judge, the Supreme Court of the United States held that the power granted was not judicial, it being not final, the award of the judge being subject to revision by the Secretary of the Treasury. The court, speaking of the powers conferred by the Act on the district judge and the Secretary of the Treasury, said:

"They are, it is true, judicial in their nature. For judgment and discretion must be exercised by both of them, but it is nothing more than the power ordinarily given by law to a commissioner appointed to examine claims to land or money under a treaty, or special powers to inquire into or decide any other particular class of controversies in which the public or individuals may be concerned. A power of this description may constitutionally be conferred on a secretary as well as on a commissioner. But it is not judicial in either case, in

the sense in which judicial power is granted by the Constitution to the courts of the United States."

And having reached the conclusion that the court, as a court, had no constitutional power under the Act, the Supreme Court proceeded to consider the question, whether the power could be exercised by the judge, as a commissioner, without additional appointment to that particular office by the President, by and with the advice and consent of the Senate, and on this point the court said:

"The duties to be performed are entirely alien to the legitimate functions of a judge or court of justice, and have no analogy to the general or special powers ordinarily and legally conferred on judges or courts to secure the due administration of the laws. And [continues the Supreme Court] if they [the district judges acting as commissioners] are to be regarded as officers, holding offices under the Government, the power of appointment is in the President, by and with the advice and consent of the Senate, and Congress could not by law designate the persons to fill these offices."

This case is absolutely conclusive, and settles beyond controversy that the bill is wholly unconstitutional, when considered in its aspect of the machinery selected for making this inquest. In Ferreira's case the powers conferred were considered as in their nature judicial, but yet not judicial in the sense of the Constitution. They were powers to determine, to adjust; but because the judgment was not final, but depended for its force on the action of another department, though there were parties before the judge, and there was a real case, a real controversy between them, and in the proper shape for forensic and judicial action, yet for the reason stated,—the want of finality,—the power was held not judicial and incapable of being conferred on a court. The powers here in this bill are not even in their nature judicial; it is a mere power to inquire, without the power to make a decision or render any judgment, final or otherwise; a power simply to inquire and report to another department.

The principles of this case are fully settled in our jurisprudence, and have been since the year 1792, when Hayburn's case was decided. There is no break in the continuity of the opinions of the Supreme Court sustaining this view. It received the sanction of the Supreme Court in Gordon *v.* United

States, 2 Wall. No opinion was delivered in that case, but one was drawn up by Chief Justice Taney just before his death, and is published as an appendix to volume 117, United States Reports. We call the attention of the Senate to it as the last great work of that great man. It will add to his fame by the soundness and force of its reasoning, and by its unanswerable exposition of the true position of the United States courts in our system.

With this, we submit the constitutional questions involved in this bill to the judgment of the Senate, in the confidence that it has been shown, both on reason and on authority, that the bill, if enacted, would be a serious infraction of the Constitution, and mischievous and unjust in its enforcement.

J. L. Pugh.
Rich'd Coke.
Geo. G. Vest.
J. Z. George.

"A BILL to provide for inquests under national authority.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever any three citizens of the United States shall, under oath, present to any judge of a circuit court, either in term-time or vacation, their petition setting forth that within the circuit for which such judge has jurisdiction, and within the State of which the petitioners are residents, any person has been killed, or has sustained serious bodily injury, or serious injury in his estate, or been threatened with injury in person or estate, because of the race or color of such person so killed, injured, or threatened, or because of any political opinion which such person so killed, injured, or threatened may have held in regard to matters affecting the general welfare of the United States, or with design to prevent such person so killed, injured, or threatened, or others, from expressing freely such opinion, or from voting as he or they may see fit at any election of officers whose election is required or provided for by the Constitution or laws of the United States, or to influence or affect the votes of such persons or others at such elections, it shall be the duty of such judge, as soon as may be, to open

a special session of such circuit court at such place within said circuit as he may appoint, and the duty of such court to hold an inquest into the circumstances of such killing, injury, or threatening, and to cause to be summoned and examined all such witnesses as the court may think proper.

"SEC. 2. That said judge shall forthwith report the evidence by him taken, and his conclusions of fact thereon, to the President of the United States, to be by him laid before Congress.

"SEC. 3. That the judge may require any district attorney of the United States within his circuit to attend such inquest, and to aid in preparing for and conducting the same, or he may, in his discretion, appoint any other counselor-at-law to prepare and conduct such inquest.

"SEC. 4. That the expenses of such inquest shall be certified by the judge to the Department of Justice, and paid out of the appropriation made for the expenses of the courts of the United States."

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